

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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4 The State of Minnesota,

5 by Hubert H. Humphrey, III,

6 its attorney general,

7 and

8 Blue Cross and Blue Shield

9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated, R.J.

13 Reynolds Tobacco Company, Brown

14 & Williamson Tobacco Corporation,

15 B.A.T. Industries P.L.C., Lorillard

16 Tobacco Company, The American

17 Tobacco Company, Liggett Group, Inc.,

18 The Council for Tobacco Research-U.S.A.,

19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 - - - - -

22 DEPOSITION OF RICHARD M. LOWTHER

23 Volume II, Pages 249 - 426

24

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1 (The following is the continued deposition
2 of RICHARD M. LOWTHER, taken pursuant to Notice of
3 Taking Deposition, under Rule 30.02(f), at the
4 offices of Robins, Kaplan, Miller & Ciresi, 1801 K
5 Street N.W., Washington, D.C., commencing at
6 approximately 8:37 o'clock a.m., May 8, 1997.

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1 I N D E X

2	EXHIBITS	DESCRIPTION	PAGE MARKED
3	Plf Ex 74	File note dated January 17,	
4		1985 by Wells, Bates	
5		680530888-90	257
6	75	Memo dated March 30, 1990,	
7		Oates to Grasch, Bates	
8		B2500951-2	271
9	76	Listing by number, author and	
10		title, Bates 657007582-616	284
11	77	"BAT BIOLOGICAL REPORTS"	
12		listing, Bates 650035192-202	284
13	78	Page 137 of J. Kendrick Wells	
14		deposition, Bates 689302932	297
15	79	Bat Co Confidential document,	
16		Bates 301122650-654 (Sealed	
17		and not distributed until	
18		further clarification)	306
19	80	Memo dated April 19, 1985,	
20		Kohnhorst to Esterle, Bates	
21		512101154	313
22	81	Memo dated April 30, 1985,	
23		DeWitt to All Vice Presidents,	
24		Bates 512102141-2	323
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1	82	Memo dated August 3, 1979,	
2		Pepples to list, Bates	
3		680260666	330
4	83	Memo dated February 7, 1986,	
5		Wells to Lawrence, no	
6		Bates number	333
7	84	Internal correspondence dated	
8		May 10, 1985, Glassner	
9		to All Department Managers,	
10		Bates 635604376	356
11	85	Memo dated 20th May, 1985,	
12		Binns to Communication Group,	
13		Bates 101427446	357
14	86	Notes on Meeting held at	
15		GR&DC, 17 July, 1985, Bates	
16		109879155	361
17	87	Pages 47 and 48 of J.	
18		Kendrick Wells deposition,	
19		Bates 689302842-3	393
20	88	Draft Research Policy Group	
21		Meeting 18-22 September	
22		1989, Bates 682810250-61	395
23			
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1 89 List dated April 8, 1993

2 "Files from JS Wigand

3 destroyed," Bates

4 682741479-83 405

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1 P R O C E E D I N G S

2 (Witness previously sworn.)

3 (Plaintiffs' Exhibits 74 was

4 marked for identification.)

5 RICHARD M. LOWTHER

6 called as a witness, being previously

7 sworn, was examined and testified as

8 follows:

9 ADVERSE EXAMINATION (cont'd)

10 BY MS. WIVELL:

11 Q. Good morning, sir.

12 A. Good morning.

13 Q. Do you understand you're still under oath?

14 A. I do.

15 Q. I have shown you what has been marked as

16 Plaintiffs' Exhibit 74, which we have referred to

17 earlier in this deposition as the deadwood memo;

18 correct?

19 A. That's correct.

20 Q. And that's because in this memo Kendrick Wells

21 suggests that he clean out the deadwood of certain

22 kinds of R&D reports from Brown & Williamson's R&D

23 files; correct?

24 MR. SCHNEIDER: Object to the form.

25 A. It's my understanding that this document is a

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1 file note prepared by Mr. Wells indicating that he
2 had marked certain document referenced -- certain
3 documents which were retained in the R&D library with
4 an X which he suggested were deadwood. It's my
5 understanding that that was an initial review of
6 these documents to identify those which were not
7 necessarily active documents and which could be made
8 available for removal into an archive and storage
9 area as opposed to being retained in -- in the -- the
10 active library.

11 MS. WIVELL: Move to strike as
12 non-responsive.

13 Q. Sir, my question was simply: Doesn't he suggest
14 that certain BAT Co R&D documents be moved out of
15 B&W's R&D files because they should be considered
16 deadwood?

17 MR. SCHNEIDER: Object to the form, asked
18 and answered, argumentative.

19 A. It's my response that they were identified by
20 Mr. Wells as an initial review to highlight those
21 which in his view were surplus to requirements in the
22 active files, but nevertheless would be retained by
23 Brown & Williamson in storage.

24 Q. But he refers to them as deadwood; doesn't he?

25 A. He does use that term, yes.

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1 Q. And that's why we call this the deadwood memo;
2 right?

3 A. That's correct.

4 Q. Okay. Now the memo starts out with a heading
5 and the date January 17th, 1985; right?

6 A. Yes, it does.

7 Q. And it refers to a conversation that he had had
8 two days earlier with Earl Kohnhorst; correct?

9 A. That's correct.

10 Q. Now the subject of this memo is document
11 retention; right?

12 A. That's correct.

13 Q. And it talks about moving documents out of R&D's
14 files and -- doesn't it, sir?

15 MR. SCHNEIDER: Object to the form.

16 A. Actually it says that he has marked documents
17 with an X and identified those as deadwood, and
18 indicates that R&D should undertake to remove
19 deadwoods from its files.

20 It is my understanding that those files were
21 removed from the R&D library and were placed into
22 storage.

23 Q. They were put into boxes, he -- or at least he
24 suggests they be put into boxes and stored in the
25 large basement storage area; right?

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1 A. That's correct.

2 Q. And he even said that we should -- the -- I'm
3 sorry, strike that.

4 He even said that Brown & Williamson should
5 consider shipping the documents to B.A.T. when they
6 had been completely segregated; right?

7 MR. SCHNEIDER: Object to the form.

8 A. It's my understanding, and based on what is said
9 in this memo, that although the -- the files were
10 actually removed from the actual area into storage
11 and indeed were never removed from storage and have
12 been produced in this case, there -- there was at one
13 time some thought being given, and Mr. Wells' file
14 note indicates that at some stage after they had been
15 segregated consideration may be given to shipping
16 these documents to B.A.T. It -- it was never the
17 case that these documents were in fact shipped, and I
18 do not even know whether any consideration of that --
19 that kind was actually given.

20 MS. WIVELL: Move to strike as
21 non-responsive.

22 Q. My question is simply this, Mr. Lowther: This
23 memo says, and I quote, "I said we should consider
24 shipping the documents to BAT when we had completed
25 segregating them;" doesn't it?

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1 MR. SCHNEIDER: Objection to the form,
2 asked and answered, argumentative.
3 A. This file note does say that.
4 Q. All right. Now this file note is a note of a
5 discussion with Earl Kohnhorst; correct?
6 A. Yes, it is.
7 Q. And Earl Kohnhorst was then head of RD&E at
8 Brown & Williamson; wasn't he, sir?
9 A. I believe so.
10 Q. And Mr. Kohnhorst is one of the people who were
11 inadvertently omitted from the list of 77 people who
12 were listed in interrogatory one, which is Exhibit
13 26; right?
14 A. It is my understanding that Mr. Kohnhorst was
15 interviewed prior to the preparation of the
16 interrogatory response that I am being deposed on
17 today. It is my understanding that Mr. Kohnhorst's
18 name has been included in early interrogatory
19 responses and in correspondence to plaintiffs. It is
20 my understanding that in the preparation of this
21 interrogatory response, Mr. Kohnhorst's knowledge may
22 have been known to outside counsel, but he was not
23 actually interviewed during the time of this
24 preparation. Nevertheless, his name perhaps should
25 have been listed. And indeed, an interview with Mr.

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1 Kohnhorst may have occurred after the preparation of
2 this interrogatory response, but the facts obtained
3 in that were consistent with what was contained in
4 the interrogatory response, so there was no need to
5 make a further report on it.

6 MS. WIVELL: Move to strike,
7 non-responsive.

8 Q. Sir, my question is a simple one: Mr.
9 Kohnhorst's name was omitted from the list of 77
10 people who were listed in Interrogatory No. 1 in
11 Exhibit 26; correct?

12 MR. SCHNEIDER: Objection, asked and
13 answered, argumentative.

14 A. That's correct.

15 Q. All right. Now in this memo Mr. Wells goes on
16 to tell us that -- or I'm -- goes on to say that he
17 had marked certain documents with an X; correct?

18 A. That's correct.

19 Q. And those documents marked with an X which he
20 suggested were deadwood fell in the behavioral and
21 biological study areas; right?

22 A. That's correct.

23 Q. These were all documents that Brown & Williamson
24 had received from BAT Co; correct?

25 MR. SCHNEIDER: Objection to the form.

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1 A. I don't know that they were all documents
2 received from BAT Co.

3 Q. So some of these documents could have been Brown
4 & Williamson's own research and development studies?

5 A. There may have been.

6 Q. But basically Mr. Wells was suggesting that
7 these kinds of deadwood studies be removed from
8 RD&E's files; right?

9 MR. SCHNEIDER: Objection to the form.

10 A. It's my understanding that Mr. Wells indicated
11 on these documents -- on this document those
12 documents which he felt could be removed from the
13 active files and removed to storage.

14 Q. Well sir, doesn't the document say at the top of
15 page two, quote, "RD&E should undertake to remove the
16 deadwood from its files?"

17 A. Yes, it does. And my answer was that while it
18 was removed from active files, they were nevertheless
19 stored within Brown & Williamson's premises in the
20 storage area.

21 Q. Okay. Let's talk about that.

22 These documents were originally placed when they
23 were received from BAT Co in the RD&E library;
24 correct?

25 A. That's correct.

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1 Q. There's a librarian for that library; right?

2 A. That's correct.

3 Q. Her name is Carol Lincoln; right?

4 A. That's true.

5 Q. She was the librarian at the time this memo was
6 written; wasn't she?

7 A. I believe she was.

8 Q. And those documents that Mr. Wells marked with
9 an X were removed physically from the RD&E library
10 where they were normally kept; right?

11 A. It's my understanding that they were taken out
12 from the active library files and removed into --
13 into a vault area, that's correct.

14 Q. A vault area in the basement; right?

15 A. That's correct.

16 Q. Where the average Brown & Williamson employee
17 would have no authority to go; right?

18 MR. SCHNEIDER: Object to the form.

19 A. Brown & Williamson as a matter of course has
20 provided security over its -- its important
21 documents, yes.

22 MS. WIVELL: Move to strike as
23 non-responsive.

24 Q. The average R&D employee would not have access
25 to these, quote, unquote, deadwood documents; would

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1 they?

2 MR. SCHNEIDER: Object to the form, outside
3 the scope.

4 A. I don't know what level of security was provided
5 over R&D documents. I know that in general R&D
6 documents are not available to the average employee
7 at Brown & Williamson. There may or may not have
8 been access provided to all R&D employees at the
9 time, I don't know.

10 Q. Sir, I was talking about the average -- the
11 average R&D employee, not the average Brown &
12 Williamson employee.

13 Isn't it true that these documents were removed
14 so that Brown & Williamson's R&D employees could not
15 have access to them without getting permission from
16 the legal department?

17 MR. SCHNEIDER: Object to the form.

18 A. No, I do not believe that is the case. It's my
19 understanding that they were removed from active
20 files because they were not needed on a day-to-day
21 basis. In the event that any R&D employee had need
22 to refer to these, which would be extremely unlikely,
23 then it would be my understanding that all he need do
24 is make reference to the librarian and have them
25 recalled from the storage area.

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1 Q. Well how could they even know these files
2 existed, because isn't it true that all reference to
3 these quote, unquote, deadwood files were removed
4 from the library?

5 MR. SCHNEIDER: Objection to the form.

6 A. It's my understanding that as a matter of good
7 business practice, the library records -- indices of
8 what is contained in the library are maintained on an
9 active basis, and if documents are removed from the
10 library, then the index is appropriately updated.

11 Q. So in other words, the answer to my question is
12 yes, all references to these documents, these
13 deadwood documents, were stricken from the RD&E
14 library records; weren't they?

15 MR. SCHNEIDER: Objection to the form,
16 asked and answered.

17 A. As I said, the library index was updated
18 appropriately. The documents were placed into
19 storage and references to them were -- were obtained
20 during the course of late 1985, early -- early 1986
21 in the course of collection of documents which were
22 believed potentially to be responsive in
23 smoking-and-health litigation, and indeed these
24 documents were swept up as part of that process at
25 that time.

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1 Q. Sir, my question is: Isn't it a fact that all
2 references to the quote, unquote, deadwood documents
3 that were taken from the RD&E library were purged
4 from the RD&E files?

5 MR. SCHNEIDER: Object to the form, asked
6 and answered.

7 A. As I said, I believe the library records were
8 updated to indicate what was active in the library,
9 and that would have entailed removing references to
10 these files which had been taken out of the library.

11 Q. So what you referred to as updating
12 appropriately really comes down to removing all
13 references to these documents from the RD&E library
14 records; correct?

15 MR. SCHNEIDER: Object to the form, asked
16 and answered.

17 A. That is correct, and that is entirely
18 appropriate behavior.

19 Q. Now what I find curious about this is that Mr.
20 Wells suggested that when this be done, Mr. Kohnhorst
21 or any of the people who did it wouldn't make any
22 records, notes, or memos about this. Do you find
23 that curious, sir?

24 MR. SCHNEIDER: Object to the form.

25 A. I -- I have not prepared myself to -- in this

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1 deposition to tell you about all the facts relating
2 to these events. My preparation is in connection
3 with the availability of documents to plaintiffs in
4 this case as laid out in the interrogatory response.
5 I can tell you from my personal viewpoint on this
6 that perhaps, since these files were surplus to
7 requirements since at this time the scientists
8 believed that there was no real business reason to
9 retain these, they did not need to refer them on --
10 to refer to these documents on a regular basis, it
11 would make no real sense to go and create additional
12 lists and notes of these files. Since they weren't
13 active files, then why make additional lists of
14 them? It's just a matter of efficiency and
15 effectiveness.

16 Q. Sir, Mr. Wells is not a scientist; is he?

17 A. That's correct.

18 Q. Mr. Wells is an attorney; right?

19 A. Yes, he is.

20 Q. And he is telling the head of RD&E what he
21 suggests be done with these documents; right?

22 A. It's my understanding, as Mr. Wells indicated in
23 his memo, that this was a first pass --

24 MS. WIVELL: Move to strike as
25 non-responsive.

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1 Q. Sir --

2 A. If I could complete my answer.

3 Q. Oh, I'm sorry.

4 A. In the third paragraph, last sentence, he said,

5 "The articles I had suggested were a first pass at

6 removing the deadwood." It's my understanding that

7 Mr. Wells then submitted these lists to scientists in

8 research and development and they then made a

9 determination as to whether these were indeed surplus

10 or not.

11 Q. But Mr. Wells, the non-scientist, suggested to

12 the head of R&D that Earl --

13 That's Mr. Kohnhorst; right?

14 A. That's correct.

15 Q. He suggested that Earl tell his people that this

16 was part of an effort to remove deadwood from the

17 files, and that neither he nor anyone else in the

18 department should make any notes, memos or lists;

19 right?

20 A. That is what is written in this memo, yes.

21 Q. So we have a non-lawyer -- I'm sorry.

22 We have a lawyer here telling a scientist the

23 process by which these documents should be purged

24 from the R&D library; right?

25 MR. SCHNEIDER: Object to the form.

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1 A. As I said earlier, it is my personal
2 understanding or my personal interpretation that Mr.
3 Wells was simply saying that here's my first pass.
4 Your people need to review it. And as a matter of --
5 of -- do not -- as a matter of excessive caution,
6 tell them not to make additional lists which would
7 not be necessary in the ordinary course of business.
8 Q. Because, actually, paper is considered to be a
9 problem at Brown & Williamson; isn't it?

10 MR. SCHNEIDER: Object to the form.

11 A. I -- I think Brown & Williamson over the years
12 has had a document-retention policy which has
13 entailed keeping documents relative to smoking and
14 health, documents needed for legal, tax and business
15 reasons, and getting rid of -- of documents which it
16 is not required to keep. To the extent that you
17 could consider that surplus documents are a problem
18 in the context of storage costs and so on and so
19 forth, then you could say that -- that paper is a
20 problem.

21 Q. Well hasn't paper been considered a liability of
22 Brown & Williamson?

23 MR. SCHNEIDER: Object to the form.

24 A. I don't know that I could agree with that, that
25 characterization, no.

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1 (Plaintiffs' Exhibit 75 was marked
2 for identification.)

3 BY MS. WIVELL:

4 Q. Sir, showing you what's been marked as B2500 --
5 I'm sorry.

6 Showing you what's been marked as Plaintiffs'
7 Exhibit 75, it is a memo dated March 30th, 1990
8 regarding a records-retention video; correct?

9 A. That's correct.

10 Q. It's Bates numbered B2500951 through 52; right?

11 A. I believe so.

12 Q. Sir, would you turn to the second page of this
13 document and look at the second-to-the-last bullet
14 point and tell me whether it says there, amongst a
15 bullet point concerning messages to focus on, that,
16 quote, "...paper can be a liability or an asset?"

17 MR. SCHNEIDER: Objection to form.

18 A. Again, my testimony here today is on the
19 contents of the interrogatory response and I've not
20 prepared myself to talk about the -- all facts
21 relating to documents produced in this case.
22 However, I can -- I can say that from my view,
23 certainly in the ordinary course of business Brown &
24 Williamson has given thought over time to how to best
25 keep its records in such a way as to avoid, in

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1 sensitive areas, items being communicated
2 inappropriately or inaccurately or in such a way that
3 they can be misinterpreted either by lawyers or
4 others, and that that's just good business practice
5 to attempt to have people aware of this issue and --
6 and to avoid unnecessary confusion and -- and
7 misinterpretation, and that it would be my personal
8 interpretation of a note like this.

9 MS. WIVELL: Move to strike as
10 non-responsive.

11 Q. Sir, my question was simply this: Doesn't it
12 say here in a bullet point concerning messages that
13 paper can be a liability?

14 MR. SCHNEIDER: Objection to form,
15 incomplete, misleading.

16 A. The paragraph here indicates a reference as to
17 showing how paper can be a liability or an asset,
18 that's correct.

19 Q. And sir, isn't it true that when Kendrick Wells
20 suggested in the deadwood memo that Earl Kohnhorst
21 tell his people not to make lists, notes or memos of
22 the movement of these documents, that he was
23 concerned that such notes, memos or lists could be a
24 liability?

25 MR. SCHNEIDER: Object to the form, outside

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1 the scope.

2 A. I don't know. And I -- I cannot -- I cannot
3 tell you what Mr. Wells was thinking at that time.
4 You have to ask him to establish that.

5 Q. Well you asked him; didn't you? You talked to
6 him about this very memo; didn't you?

7 MR. SCHNEIDER: Object to the form.

8 A. I believe in my testimony yesterday I told you
9 that I spoke to Mr. Wells about the context of this
10 memo, and my questions were directed to the general
11 background of what was going on in the company at
12 that time.

13 Q. Well when you talked to Mr. Wells, had you read
14 the memo before you talked to him?

15 A. Yes, I had.

16 Q. Did you --

17 Did you talk to him in person?

18 A. Yes, I did.

19 Q. Did you have the memo there with you so you
20 could talk to him about it?

21 A. Yes, I did.

22 Q. Did you ask him what he meant by telling the
23 people not to leave tracks by making notes and memos
24 or lists?

25 MR. SCHNEIDER: Object to the form, outside

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1 the scope.

2 A. My preparation for this deposition was in the
3 context of what is included in the interrogatory
4 response. I did not reperform interviews that were
5 conducted as part of the due diligence review. And
6 as I said, I did not ask him about his intention in
7 that particular case.

8 MS. WIVELL: Sir, move to strike as
9 non-responsive.

10 Q. Did you ask him what he meant by telling the R&D
11 people not to make any notes, memos or lists?

12 MR. SCHNEIDER: Object to the form, asked
13 and answered, argumentative.

14 A. I did not.

15 Q. Now you said a little bit ago that you did not
16 reperform any of the interviews that were done. You
17 understood Mr. Wells had been interviewed in
18 preparation for the interrogatory -- of the
19 interrogatory answers.

20 A. I believe that's correct.

21 Q. But you hadn't read any notes concerning his
22 interview; had you?

23 A. I haven't read any interview notes. I don't
24 know if any interview notes were prepared of the
25 interview with Mr. Wells.

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1 Q. So essentially you have no first-hand knowledge
2 of any of the information that Mr. Wells provided
3 during that interview in preparation for the
4 interrogatory which is marked as Exhibit 26; do you,
5 sir?

6 A. I have no first-hand knowledge, and nor do I
7 think that in preparation for this deposition was
8 there a requirement that I have first-hand knowledge.

9 Q. Well sir, isn't it a fact that Exhibit 74, the
10 deadwood memo, was listed -- was provided as an
11 exhibit to the interrogatory answers which Brown &
12 Williamson filed on February 11th, 1997?

13 A. That's correct.

14 Q. So you didn't think it would be important to
15 talk to Mr. Wells about what he meant when he told
16 the people in RD&E not to make any file notes, memos
17 or lists.

18 MR. SCHNEIDER: Objection.

19 Q. Even though that document was attached to the
20 interrogatory answers?

21 MR. SCHNEIDER: Object to the form, outside
22 the scope.

23 A. It's my understanding that I'm here today to
24 talk about matters of the destruction of records, the
25 only copy of records relating to smoking and health,

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1 advertising, media -- marketing and promotion, and
2 that this particular circumstance was disclosed in
3 the interrogatory response not because any evidence
4 was found that Brown & Williamson had indeed
5 destroyed in this particular instance any records
6 relating to smoking and health, the only copy of --
7 of such, but simply because this document has had
8 some publicity and some people have misconstrued --
9 misconstrued the circumstances. I have appraised
10 myself of the background and the facts relating to
11 this document, did not, as part of that, discuss and
12 reperform other interviews held by outside counsel
13 with Mr. Wells.

14 Q. Well sir, I'm curious about how you got to that
15 conclusion. Could you get out Exhibit 55, the notice
16 for this deposition, so that we can clearly get in
17 hand what this deposition is about.

18 Do you have it there, sir?

19 A. I do.

20 Q. This deposition, if you turn to the second page,
21 concerns the supplemental responses to certain
22 plaintiffs' interrogatories to Brown & Williamson
23 Tobacco Corporation served February 11th, 1997;
24 right?

25 A. That's correct.

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1 Q. And this document, the deadwood memo, was an
2 exhibit that Brown & Williamson provided to the
3 plaintiffs as part of the exhibits to those
4 interrogatory answers served February 11th, 1997;
5 correct?

6 A. That's correct.

7 Q. So it would be reasonable to assume that you
8 might be asked questions about this deadwood memo at
9 this deposition; wouldn't you think?

10 A. Indeed. And I have prepared myself to do so.

11 Q. Okay. So how did you prepare yourself to find
12 out what Kendrick Wells meant when he said that the
13 people at RD&E shouldn't make any notes, memos or
14 lists of this attempt to purge the library of BAT
15 Co-related smoking-and-health documents?

16 MR. SCHNEIDER: Objection, outside the
17 scope.

18 A. It is my understanding that this interrogatory
19 was about information that Brown & Williamson has
20 relative to the destruction of its only copy of
21 smoking-and-health advertising, marketing and
22 promotion documents, it is not about all facts known
23 by employees or otherwise at Brown & Williamson
24 relating to document destruction and motivations and
25 background issues like that, and I have not prepared

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1 myself to discuss those points.

2 Q. So despite the fact that this document was an
3 exhibit to the interrogatories that you knew you were
4 going to come here and talk about, you didn't ask
5 those questions; did you, sir?

6 MR. SCHNEIDER: Object to the form.

7 A. I have, I believe, testified to the effect that
8 the facts relating to the retention of the documents
9 referenced in this case and the facts that I know are
10 that all of these documents are still retained by
11 Brown & Williamson and indeed have been produced in
12 this case. That, I think, are the facts that are
13 relevant and are important in this issue.

14 Q. Sir, that's not my question. My question is
15 simply: You did not take upon yourself to find out
16 the actual context of why Mr. Wells told the RD&E
17 people not to make any notes, memos or lists of the
18 documents that were purged from the RD&E library;
19 isn't that true?

20 A. I did not --

21 MR. SCHNEIDER: Objection to the form.

22 A. I did not ask Mr. Wells that question.

23 Q. Now did you talk to Carol Lincoln, who's
24 referred to in the next paragraph?

25 A. I personally did not.

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1 Q. Now it says in the next paragraph, "I mentioned
2 that Carol Lincoln had said that offshore research
3 and engineering studies sent to B&W in care of Earl
4 and Bob Sanford during roughly the last one year
5 period had not been sent to her for logging in...."
6 That's not all of the sentence, but let's stop
7 there.

8 She's referring to documents received from
9 B.A.T. and BAT Co; correct?

10 MR. SCHNEIDER: Objection to the form.

11 A. Received -- received from B.A.T. affiliates, I
12 believe, yes.

13 Q. Okay. Fair enough. So that's --

14 That first sentence that talks about Carol
15 Lincoln not getting the offshore research and
16 engineering studies refers to materials that were
17 sent to B&W from B.A.T.-related companies. Fair
18 enough?

19 A. That's what it says, yes.

20 Q. Okay. And it was typical at Brown & Williamson
21 that she was supposed to get those documents so that
22 they could be logged in; right?

23 MR. SCHNEIDER: Objection to the form.

24 A. It's my understanding that at this time there
25 may have been some delay in passing on documents to

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1 Carol Lincoln which had been sent to Mr. Kohnhorst or
2 Mr. Sanford.

3 Q. Well you didn't talk to Ms. Lincoln. How did
4 you know that there was, quote, unquote, some delay?

5 MR. SCHNEIDER: Objection to the form.

6 A. I did not know that.

7 Q. Ah. So when you said that just a few moments
8 ago, you really don't have any personal knowledge of
9 that one way or the other; do you?

10 A. That's correct.

11 Q. And you haven't talked to anyone so that you
12 could, as Brown & Williamson's spokesman, testify
13 accurately about that; have you?

14 A. I have not undertaken interview of -- of Ms.
15 Lincoln, that's correct.

16 Q. And you haven't reviewed any notes that might
17 have been made of her interviews.

18 A. I have not.

19 Q. So you have no first-hand knowledge about why
20 she wasn't getting the reports to log in to the
21 library that she normally report -- normally got;
22 right?

23 MR. SCHNEIDER: Object to the form.

24 A. I do not.

25 Q. Now have you seen the list of documents that Mr.

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1 Wells thought were deadwood?

2 A. I believe I have.

3 Q. Before we go on to that, sir, isn't it true that
4 the reason these documents were moved was so that B&W
5 could attempt to keep them out of the hands of
6 plaintiffs' lawyers in product-liability suits which
7 had been brought against Brown & Williamson at that
8 time?

9 MR. SCHNEIDER: Object to the form, outside
10 the scope, misleading, asked and answered.

11 A. I don't believe that that is the case. My
12 understanding is that these were files identified as
13 surplus to requirements which, following review by
14 scientists and con -- confirmed to be surplus and not
15 needed for active purposes, were removed into a
16 storage area, were nevertheless collected up and
17 swept during a collection process to sweep documents
18 which were relevant, potentially relevant in future
19 litigation, and have always been retained by Brown &
20 Williamson and indeed have been produced in this
21 case.

22 MS. WIVELL: I'm not talking about this
23 case, so I'm going to move to strike as
24 non-responsive.

25 Q. Isn't it true that the reason these documents

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1 were moved was so that Brown & Williamson could keep
2 them out of the hands of plaintiffs' lawyers in
3 product-liability suits that had been brought at the
4 time that this memo was written?

5 MR. SCHNEIDER: Objection, asked and
6 answered, argumentative, misleading, misstates the
7 record.

8 A. I don't believe that that is the case.

9 Q. Well sir, isn't it true that between 1994 --
10 between -- let me start again.

11 Isn't it true that between 1954 and 1994, Brown
12 & Williamson had produced only approximately 1350
13 pages of documents in total in the liability --
14 product-liability suits which had been brought
15 against it?

16 MR. SCHNEIDER: Objection to the form.

17 A. It's my understanding that, during earlier
18 periods of time, Brown & Williamson has in fact
19 produced, as you say, 1300-odd pages in an individual
20 smoking-and-health case, but that -- that in other
21 cases it has made documents available to plaintiffs.
22 It has complied with discovery requirements over the
23 years. And for various reasons in earlier cases,
24 production has not been made either because the case
25 has -- has -- has dissipated or the plaintiff's

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1 attorney has died or for various reasons. But at --
2 at all times Brown & Williamson has had a policy of
3 keeping documents which are potentially required for
4 smoking-and-health litigation and has done a good job
5 in -- in doing so.

6 MS. WIVELL: Move to strike as
7 non-responsive.

8 Q. My question is simple, sir: From 1954 to 1994,
9 Brown & Williamson only produced a total of 1350
10 pages in any individual product-liability
11 smoking-and-health-related case. That's true; isn't
12 it, sir?

13 MR. SCHNEIDER: Objection to the form,
14 asked and answered, argumentative.

15 A. I believe that's correct.

16 Q. Now the list of the studies that Mr. Wells
17 refers to in the deadwood memo are the B list;
18 correct? That's one of the lists.

19 MR. SCHNEIDER: Object to the form.

20 A. His memorandum says that the B series or Janus
21 series studies and should also be considered as
22 deadwood.

23 Q. And also a list that he designated with X's next
24 to the list of the studies; right?

25 A. It's my understanding that he marked certain of

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1 the document references with an X.

2 (Plaintiffs' Exhibits 76 and 77

3 were marked for identification.)

4 BY MS. WIVELL:

5 Q. Sir, showing you what have been marked as

6 Plaintiffs' Exhibits 76 and 77, I'd like you to

7 identify them for record, please.

8 A. Plaintiffs' Exhibit 76 is a list of -- well it's

9 entitled "1983." It's obviously a listing by year of

10 various reports with headings "Number, Author" and

11 "Title."

12 Q. All right. And am I correct that it's Bates

13 numbered 657007582 through 657007616?

14 A. That appears to be correct.

15 Q. And you understand that this is the list that

16 Kendrick Wells went through and put X's next to the

17 documents that he thought were deadwood and should be

18 purged from the RD&E library; right?

19 MR. SCHNEIDER: Object to the form.

20 A. I believe that was Mr. Wells' first pass, if you

21 will.

22 Q. Okay. So we're clear here, Exhibit 76 is the --

23 is one of the two lists that Mr. Wells used on which

24 he indicated by an X those documents he thought were

25 deadwood; right?

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1 MR. SCHNEIDER: Object to the form.

2 A. I don't know that two lists were prepared. I
3 believe this document I have seen before, and this
4 is, I understand, the list that Mr. Wells marked
5 up --

6 Q. All right.

7 A. -- with an X.

8 Q. And so those things that are marked with an X
9 are those things which he designated and suggested
10 were deadwood; correct?

11 A. I believe that's right.

12 Q. Sir, those documents that are marked with an X
13 comprise well more than 1350 pages; right?

14 MR. SCHNEIDER: Object to the form.

15 A. It is my understanding that somewhere in the
16 region of 1700 documents were identified in this --
17 in this circumstance.

18 Q. And -- and a document may be more than one page;
19 correct?

20 A. I believe so.

21 Q. And in fact, have you ever looked at any of the
22 reports that are marked with an X by Mr. Wells that
23 he suggested were deadwood?

24 A. I don't know that I have.

25 Q. Well you know that many are multi-page

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1 documents; right?

2 A. It is my understanding that would be the case.

3 Q. Sir, and -- and you know for a fact that none of
4 the documents which were marked with an X were among
5 the 1350 pages that Brown & Williamson produced to
6 plaintiffs' counsel between the years 1954 and 1994;
7 right?

8 MR. SCHNEIDER: Object to the form.

9 A. It is my understanding that the 1300-some pages
10 that you're referring to, if they are indeed the ones
11 you're referring to as the ones produced in the Dewey
12 case, it's my understanding -- and my testimony
13 yesterday may not have been entirely clear -- that
14 those documents which were produced in the Dewey case
15 were relating to advertising and marketing and not
16 necessarily to smoking-and-health scientific
17 studies. It's my understanding that that was by
18 agreement and during the course of objections and
19 stays which were entered into in the -- the Dewey
20 case; that while Brown & Williamson had been prepared
21 to produce some scientific studies in that case, they
22 were never actually produced. So I don't believe
23 that there would have been any overlap between those
24 1300 documents and these reports identified by Mr.
25 Wells.

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1 MS. WIVELL: Objection, non-responsive.

2 Q. My question is simply this: None of the
3 documents listed here marked by an X were produced in
4 Dewey; were they?

5 MR. SCHNEIDER: Objection, asked and
6 answered, misleading, misstates the record,
7 argumentative, improper.

8 A. It's my understanding that since Mr. Wells was
9 indicating or identifying by first pass some
10 scientific reports, and since the -- the production
11 in the Dewey case was related to advertising and
12 marketing, then indeed none of these would have been
13 produced in the Dewey case.

14 Q. So the answer to the question is none of these
15 documents were produced in Dewey; right?

16 A. I believe that to be correct.

17 Q. Now let's take a look at Exhibit 77. That is a
18 document Bates numbered 650035192 through 650035202;
19 correct?

20 A. That's correct.

21 Q. And this document is the B series that's
22 referred to in Mr. Wells' deadwood memo on the first
23 page; correct?

24 MR. SCHNEIDER: Object to the form,
25 misleading.

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1 A. I don't know.

2 Q. Well all of these reports start with the letter

3 B; right?

4 A. That they do.

5 Yes, that's correct.

6 Q. And isn't it true that your counsel has written

7 plaintiffs' attorneys and told us that this is the

8 document that Mr. Wells is referring to in the second

9 page of his deadwood memo?

10 MR. SCHNEIDER: Object to the form.

11 A. I don't know that.

12 MS. WIVELL: All right. Let's go off the

13 record for a moment.

14 THE REPORTER: Off the record, please.

15 (Recess taken.)

16 BY MS. WIVELL:

17 Q. Sir, if you turn back to the deadwood memo,

18 which is Exhibit 74, and turn to the second

19 paragraph, Mr. Wells makes reference to a list on

20 which he has designated documents with an X; correct?

21 A. That's correct.

22 Q. And then the last sentence of the second

23 paragraph said, "I said that the 'B' series are,

24 quote, Janus," J-a-n-u-s, "quote, series documents

25 and should also be considered as deadwood." Correct?

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1 A. That's correct.

2 Q. Now if we take a look at Exhibit 77, that is a
3 list of B.A.T. biological reports, all of which begin
4 with a B; correct?

5 A. That's correct.

6 Q. And if you turn to the third page, you see
7 references to Janus; correct? In fact that is used
8 in one of the titles of the documents, right?

9 A. I see it referenced in one -- one -- one of
10 these items, yes.

11 Q. And if you turn to the page number which is
12 Bates numbered 201, there is a, quote, "JANUS SAMPLE
13 IDENTIFICATION" list; isn't there, sir?

14 A. Yes, there is.

15 Q. Do you understand that Janus was the code
16 name -- (coughing) pardon me. Let me begin again.

17 Do you understand that Janus was the code name
18 for a series of projects undertaken by BAT Co
19 scientists in the '60s relating to smoking-and-health
20 issues?

21 MR. SCHNEIDER: Object to the form.

22 A. I've not prepared myself in respect of what the
23 Janus series is. I understand that they are
24 scientific studies. I don't know what -- what their
25 nature is.

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1 Q. You understand that they were conducted at or
2 beyond -- or on behalf of BAT Co; correct?

3 A. I don't know that.

4 Q. You just don't have any information about that
5 subject one way or the other; right?

6 A. I understand that there were studies undertaken
7 which were of relevance at some time within the BAT
8 Group. I have no knowledge as to who required them,
9 who requested them, who -- who undertake -- undertook
10 these studies.

11 Q. Did you ask Mr. Wells when you saw him whether
12 the list we have in front of us which is Exhibit 77
13 entitled "BAT BIOLOGICAL REPORTS" was what he
14 referred to as the B series or the Janus series?

15 A. I did not.

16 Q. Now sir, isn't it true that shortly after Mr.
17 Wells' deadwood memo was written, that there were
18 changes established in the procedure for receiving
19 reports from B.A.T.-related companies?

20 MR. SCHNEIDER: Object to the form.

21 A. It's my understanding that at the time Mr. Wells
22 wrote this memo, the pace of -- of smoking-and-health
23 litigation was such that Brown & Williamson was
24 giving consideration to preparing itself for -- for
25 such potential litigation and that Brown & Williamson

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1 initiated some programs to collect up documents
2 relating to smoking and health, and at the same time
3 consideration was being given to the issue of how
4 scientists in other parts of the world who are not
5 aware of market conditions in the U.S., who are not
6 aware of regulations and the litigation environment
7 in the U.S., may have been couching the results of
8 their scientific findings inappropriately or
9 unclearly in a way that may have been misconstrued
10 either deliberately or otherwise by lawyers or other
11 people, and that as a matter of good practice Brown &
12 Williamson did give consideration to, in conjunction
13 with -- with BAT Co, how best to perhaps educate
14 scientists on how they should present their facts
15 clearly -- clearly. And that as in my testimony
16 yesterday, for a short period of time indeed
17 documents which were issued by scientists were routed
18 to B&W through an outside attorney for the purposes
19 of provision of advice to the scientists. All of
20 these things were happening at -- at the time that
21 Brown & Williamson was initiating a program to
22 collect documents, which it did, and which it has
23 over the years collected large numbers of documents
24 relating to smoking and health, and indeed has
25 produced them in this case.

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1 MS. WIVELL: Move to strike,
2 non-responsive.

3 Q. Sir, my question is simply this: Isn't it true
4 that shortly after Mr. Wells' deadwood memo was
5 written, that there were changes established in the
6 procedure for receiving B.A.T. -- reports from
7 B.A.T.-related companies?

8 MR. SCHNEIDER: Object to the form.

9 A. It's my understanding that certain changes in
10 distribution of scientific reports were being
11 considered in 19 -- late 1984 or early 1985, and
12 indeed that timing is consistent with Mr. Wells'
13 memorandum.

14 Q. Sir, isn't it true that, from Brown &
15 Williamson's perspective after it was sued in the
16 mid-'80s, anything which might possibly add to the
17 burden of defending U.S. litigation should be
18 avoided?

19 MR. SCHNEIDER: Object to the form.

20 A. I don't believe that --

21 My understanding is that, as I said earlier,
22 steps were taken to review what could be done to
23 avoid misinterpretation of reports issued by people
24 who are not lawyers, who are not familiar with the
25 litigation environment, who are not familiar with the

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1 regulatory environment in the U.S.A., and
2 consideration was given as to how best to avoid
3 circumstances where reports they were writing could
4 be misconstrued deliberately or otherwise. And it
5 was a matter of -- of preventative law, I think was a
6 term used earlier.

7 MS. WIVELL: Move to strike as
8 non-responsive.

9 Q. Sir, my question is simply this: Wasn't it
10 Brown & Williamson's perspective in the mid-'80s,
11 after it had been sued in a number of individual
12 smoking-and-health-related cases, that anything that
13 might potentially add to the burden of defending
14 litigation in the United States should be avoided?

15 MR. SCHNEIDER: Object to the form.

16 A. No, I haven't finished my earlier answer, which
17 I think is still the same question again. But as I
18 said, steps were taken to educate scientists in how
19 to communicate their facts, and at the same time
20 Brown & Williamson was collecting large numbers of
21 documents relating to smoking and health into --

22 Millions of pages were collected and have been
23 retained by counsel for smoking-and-health litigation
24 and have been produced in this case.

25 Q. Millions of pages were collected, but only 1350

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1 pages were produced to plaintiffs' counsel between
2 1954 and 1994; correct?

3 MR. SCHNEIDER: Object to the form, asked
4 and answered, misleading.

5 A. Could you repeat the question, please.

6 Q. Certainly, sir.

7 You said millions of pages were collected, but
8 isn't it true that only 1350 pages were produced to
9 plaintiffs' counsel between 1994 -- excuse me,
10 between 1954 and 1994?

11 MR. SCHNEIDER: Objection to the form.

12 A. It's my understanding that some 1300 pages were
13 produced relating to advertising and marketing in the
14 Dewey case. It's my understanding that many
15 thousands of pages have been produced by Brown &
16 Williamson in the -- the period you described in
17 connection with FTC investigations, in connection
18 with other cases not relating to smoking and health.
19 It is my understanding that over a period of time
20 Brown & Williamson has complied with all discovery
21 requests, that it has -- has done so over a period of
22 years. And the 1300 pages you refer to were not
23 smoking-and-health-related documents.

24 MS. WIVELL: Move to strike as
25 non-responsive.

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1 Q. Sir, my question is simply this: While
2 millions of pages were collected, only 1350 pages
3 were produced to plaintiffs' counsel in
4 smoking-and-health-related cases between 1954 and
5 1994; right?

6 MR. SCHNEIDER: Objection to the form,
7 asked and answered, misleading.

8 A. My understanding is that Mr. Wells' reference to
9 the 1300 pages produced was in individual
10 smoking-and-health cases in that period prior to
11 April 1985 -- '95.

12 Q. And that's what I'm asking you about. So
13 despite the fact that we -- we know -- we have two
14 lists, Exhibits 77 and 76, of tests which comprise
15 thousands of pages of smoking-and-health-related
16 data, none of the reports that were mentioned on
17 Exhibit 77 or Exhibit 76 were provided to plaintiffs
18 in the period between 1954 and 1994; isn't that
19 true?

20 MR. SCHNEIDER: Object to the form.

21 A. I cannot confirm that none have been provided to
22 plaintiffs in -- in any case prior to 1995. I can --
23 I can tell you that my understanding is that we
24 produced 1300 pages in the Dewey case, which were not
25 related to scientific documents.

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1 Q. And we established yesterday that between 1954
2 and 1994, the Dewey production was the only
3 production of documents in which plaintiffs' counsel
4 actually got documents from Brown & Williamson in
5 that period; right?

6 MR. SCHNEIDER: Objection to the form,
7 misleading, asked and answered.

8 A. No, I don't believe that's true. It's my
9 understanding that in some cases in the -- in Texas,
10 documents were made available to plaintiffs' counsel.

11 Q. But we established yesterday that they actually
12 didn't get them; did they?

13 MR. SCHNEIDER: Object to the form, asked
14 and answered.

15 A. Nevertheless, whether they were sent to
16 plaintiffs or not, they were provided, they were made
17 available in local counsel's offices to plaintiffs in
18 the Texas case.

19 Q. Sir, are you familiar with Mr. Wells' testimony
20 where he said, quote, "In the Texas litigation, my
21 recollection is that the plaintiffs actually received
22 no documents?" Are you familiar with that, sir?

23 A. Can you tell me --

24 MR. SCHNEIDER: Object to the form.

25 A. Could you tell me which exhibit this is?

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1 Q. Well here, let me give you a copy of Mr. Wells'
2 testimony on that subject.

3 (Plaintiffs' Exhibit 78 was marked
4 for identification.)

5 MR. SVODODA: Could we get a better
6 reference as to what the testimony comes from?

7 BY MS. WIVELL:

8 Q. Sir, showing you what's been marked Plaintiffs'
9 Exhibit 78, it is a portion of Mr. Wells' testimony
10 from the Butler case and it's Bates numbered
11 689302932. Am I correct in that, sir?

12 A. I believe you are.

13 Q. All right. And if you look at page 137, lines
14 23, 24 and 25, does he not say, quote, "In the Texas
15 litigation, my recollection is that the plaintiffs
16 actually received no documents," close quote?

17 A. It's my understanding --

18 I may have seen more of this yesterday. Did --
19 did I only see this one page yesterday?

20 Q. I didn't show you this yesterday, sir.

21 My question is: And at lines 23 through 25,
22 doesn't he say, quote, "In the Texas litigation, my
23 recollection is that the plaintiffs actually received
24 no documents," close quote?"

25 A. It is my understanding that Mr. Wells in his

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1 deposition was talking about the actual presentation,
2 receiving of documents by plaintiffs, and he did say
3 that prior to April 1995 only some 1300 documents had
4 been received by plaintiffs. Nevertheless, in the
5 Texas litigation, my understanding is that those
6 documents were made available to plaintiffs in the
7 offices of in-house counsel. They did not avail
8 themselves of that facility.

9 MS. WIVELL: Move to strike as
10 non-responsive.

11 MR. SCHNEIDER: Objection to the form.

12 Q. Sir, my question is simple: Exhibit 78, lines
13 23 through 25, states, quote, "In the Texas
14 litigation, my recollection is that the plaintiffs
15 actually received no documents," close quote; isn't
16 that true, sir?

17 A. That's correct.

18 Q. Thank you.

19 Now sir, at the time we've been talking about,
20 the mid-'80s when Brown & Williamson had been sued in
21 individual smoking-and-health-related cases, wasn't
22 it Brown & Williamson's position that it was opposed
23 to any research which has any relevance to the issue
24 of smoking and health because of the
25 product-liability situation in the United States?

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1 MR. SCHNEIDER: Object to the form,
2 misleading.

3 To the extent that you're reading from a
4 document that you've not designated, we'd appreciate
5 the opportunity to see the documents that you want to
6 talk to about with this witness so as to make the
7 deposition operate in a --

8 MS. WIVELL: I object to the speaking
9 objection, Mr. Schneider.

10 MR. SCHNEIDER: Please don't interrupt me,
11 Ms. Wivell. You did it yesterday. I don't think
12 it's appropriate. Let me finish my statement.

13 MS. WIVELL: No. I don't need your
14 statement. I need your objection and that's enough;
15 that's what the court has ordered.

16 MR. SCHNEIDER: Ms. Wivell, I'm asking you
17 to provide to us any further documents you intend to
18 use with the witness that you have not designated so
19 that we can facilitate this deposition.

20 MS. WIVELL: Sir, do you have my question
21 in mind?

22 THE WITNESS: No, I do not.

23 MS. WIVELL: All right. Let me read it
24 again.

25 Q. Now, sir, at the time we've been talking about,

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1 the mid-'80s when Brown & Williamson had been sued in
2 individual smoking-and-health-related cases, wasn't
3 it Brown & Williamson's position that it was opposed
4 to any research which has any relevance to the issue
5 of smoking and health because of the
6 product-liability situation in the United States?

7 MR. SCHNEIDER: Object to the form,
8 misleading.

9 A. That --

10 My understanding is that would not be consistent
11 with what I would -- would believe would be Brown &
12 Williamson's position.

13 Q. Well you weren't with Brown & Williamson at the
14 time; right?

15 A. That's correct.

16 Q. And isn't it true, sir, that it was Brown &
17 Williamson's position that any research which is
18 smoking-and-health-related -- related, other than
19 funding of broadly-based external programs, could
20 lead to discoveries which might be damaging in
21 court?

22 MR. SCHNEIDER: Objection to the form.

23 A. Would you repeat the question, please.

24 Q. Certainly.

25 Isn't it true that it was Brown & Williamson's

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1 position that any research which is
2 smoking-and-health-related, other than the funding of
3 broadly-based external programs, could lead to
4 discoveries which might be damaging in court?

5 MR. SCHNEIDER: Object to the form.

6 Ms. Wivell, I would ask you if your -- if your
7 question is being read from a privileged, stolen
8 document, I would like to see the document so that I
9 can have the benefit of making an objection and an
10 instruction. Can you represent to me whether you are
11 reading from a stolen, privileged document?

12 MS. WIVELL: This is not my deposition, Mr.
13 Schneider.

14 Do you have the question in mind, sir?

15 MR. SCHNEIDER: I believe it is your
16 deposition; you're taking it, Ms. Wivell. And I'm
17 asking you whether you're reading from a stolen,
18 privileged document.

19 MS. WIVELL: Do you have the question in
20 mind, sir?

21 THE WITNESS: I'd appreciate it if you'd
22 repeat it.

23 Q. Isn't it true that it was Brown & Williamson's
24 position that any research which is
25 smoking-and-health-related, other than the funding of

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1 broadly-based external programs, could lead to
2 discoveries which might be damaging in court?

3 MR. SCHNEIDER: Object to the form.

4 A. I believe that, as I said earlier, Brown &
5 Williamson has taken steps in the past to -- to
6 ensure that the communication of scientific studies
7 are couched in clear terms, using language that can
8 avoid misinterpretation, which I believe is
9 appropriate behavior. It was not undertaken to avoid
10 discovery. I'm not aware of any circumstance where
11 Brown & Williamson has taken steps to avoid
12 discovery. Indeed, I know that Brown & Williamson
13 has over the years collected documents for the
14 purposes of smoking-and-health litigation, has done
15 so in good faith, and has produced large numbers of
16 documents.

17 I can't comment on a specific document that you
18 seem to be referring to at the moment.

19 Q. Sir, isn't it true that Brown & Williamson did
20 take steps to try and insulate materials that was
21 received from B.A.T.-related companies so that they
22 would not be produced in product-liability cases in
23 the United States?

24 MR. SCHNEIDER: Object to the form.

25 A. I -- I -- I do understand that during the period

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1 from 1970 to 1993, as part of -- of reviewing the
2 document-retention practices of Brown & Williamson,
3 an investigation was made into reports that were
4 prepared for distribution to Brown & Williamson by
5 BAT Co, and that of some 700 -- more than 700 reports
6 issued in that period which reference Brown &
7 Williamson as a recipient, only 10 have not been
8 found in the files of Brown & Williamson. I do not
9 see that as evidence of any attempt to avoid
10 discovery related to this scientific research.

11 MS. WIVELL: Move --

12 A. Other than that, I'm not sure that I can respond
13 to your question.

14 MS. WIVELL: Move to strike as
15 non-responsive.

16 Q. My question was different, sir. Isn't it true
17 that Brown & Williamson did take steps to try and
18 insulate itself from the receipt of B.A.T.-related
19 materials so that they would not be produced in
20 product-liability cases in the United States?

21 MR. SCHNEIDER: Object to the form, outside
22 the scope.

23 A. Again my response is that I have come today,
24 I've been prepared to speak to the facts relating to
25 document retention by Brown & Williamson. We have

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1 done a good-faith review to discover circumstances
2 as -- as described in the court order, and
3 circumstances have been described in this
4 interrogatory response where reports have either been
5 routed, as I described earlier, through an attorney
6 for the purposes of provision of advice back to the
7 scientists, and I have also included in -- in the
8 interrogatory circumstances where some reports have
9 been -- consideration -- consideration has been given
10 as to the need for Brown & Williamson to receive
11 reports which have been issued by other companies in
12 the BAT Group. I also know that Brown & Williamson's
13 business requirements are not necessarily at every
14 time the same as those of other members of the BAT
15 Group. The products we make are blended U.S.-style
16 cigarette products; other members of the group have
17 Virginia-type cigarettes. So there are circumstances
18 where research being done in other group companies
19 are not relevant and are not necessary for Brown &
20 Williamson to receive, and consideration has been
21 given from time to time as to how steps could be
22 taken so as not to clutter up our records of those.

23 So in context, thought has been given to not
24 receiving reports in the past, but I do not -- I have
25 no evidence that tells me that Brown & Williamson has

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1 at any time attempted to avoid discovery.

2 Q. Sir, my question was: Didn't Brown & Williamson
3 take steps to try and insulate itself so that
4 materials from B.A.T.-related companies would not be
5 discovered and prove damaging in courts in the United
6 States?

7 MR. SCHNEIDER: Object to the form.

8 A. I believe in an earlier answer I outlined
9 circumstances where steps were taken not to receive
10 reports. I cannot tell you that that was to avoid
11 discovery. I don't believe that to be the case.

12 MS. WIVELL: This document which I am now
13 about to mark is marked "BAT Co CONFIDENTIAL."

14 MR. SCHNEIDER: Mr. Lowther has signed an
15 Exhibit A.

16 MS. WIVELL: I can't give it to you
17 (talking to Ms. Turland). I can only give it to
18 Jerry.

19 MR. SVOBODA: No, you can give it to her.

20 MS. WIVELL: Oh, I can?

21 MR. SVOBODA: Yes.

22 MS. WIVELL: I'm sorry.

23 MR. SVOBODA: No, she's from Simpson
24 Thacher.

25 MS. WIVELL: I apologize. I thought -- I

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1 didn't realize it. I'm sorry.

2 MR. SCHNEIDER: And Mr. Lowther has signed
3 an Exhibit A.

4 MR. SIPKINS: You can give it to all -- you
5 can give it to all counsel. You cannot give it to
6 in-house counsel or employees of the company, but you
7 can give it to all counsel.

8 (Plaintiffs' Exhibit 79 was marked
9 for identification.)

10 BY MS. WIVELL:

11 Q. Sir, this is a document which has been marked
12 "BAT Co CONFIDENTIAL, MINNESOTA TOBACCO LITIGATION,"
13 and it's Bates numbered 301122650 through 654;
14 correct?

15 MR. SCHNEIDER: Object to the form. And I
16 want to take a moment to determine whether or not we
17 have any objection to the nature of this document.

18 THE REPORTER: Off the record, please.

19 (Discussion off the record.)

20 (Record read by the court reporter.)

21 A. I believe that's correct.

22 MR. SCHNEIDER: I would like to take a
23 break at this point.

24 THE REPORTER: Off the record.

25 (Recess taken.)

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1 MR. SVOBODA: This is Jerry Svoboda. Ms.
2 Wivell, I think the document which you have just
3 introduced is a document which is a privileged
4 document which was inadvertently produced, and which,
5 as I understand it, you have agreed to return. I
6 have asked Ms. Turland to go and call and confirm
7 that, but I believe that's the case. And this points
8 out the difficulty we have when you do not
9 pre-designate documents for a deposition. Now the
10 order requires that there be a designation of records
11 except for those which are true -- I forget if it
12 says true or genuine impeachment, and the definition
13 of impeachment, according to the Rules of Evidence,
14 is a prior inconsistent statement by this witness or
15 a statement for which he vouches. Obviously nothing
16 in this document could be either, since it's from a
17 different company, could either be his statement or a
18 statement for which he vouches, so it can't possibly
19 be true impeachment. As a consequence, you have, I
20 think, demonstrated the very problem which we've all
21 been uneasy with since you started doing this, is
22 that you have a huge category of documents which none
23 of us were aware you were intending to use.

24 And as a consequence, I state the objection that
25 this is a privileged document which you're not

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1 authorized to use for two reasons: one because it's
2 privileged; and two, because you have not previously
3 designated it, giving us the opportunity to make an
4 appropriate objection in court. And so as a
5 consequence, I would request that Mr. Schneider
6 instruct his witness not to answer questions
7 regarding this document.

8 MS. WIVELL: Well I would like to respond
9 to that. Number one, I'm unaware completely of any
10 assertion of privilege with regard to this document.
11 It was produced to us, it was copied by us, and I
12 used it for the purpose of impeachment which is
13 allowed pursuant to the stipulated order of the
14 parties dated June 11th of, I believe it is, last
15 year. This witness has made statements which are
16 directly contrary to statements in this document, and
17 I believe he can be impeached by it.

18 Until you show me that you have made an
19 assertion of privilege with this document, I'm going
20 to continue asking him questions about it. I don't
21 believe it's appropriate at the time that you're
22 faced with documents that you don't like that you
23 suddenly assert a privilege.

24 This document was produced to us, and I can --
25 we can take a break and I can check how long ago it

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1 was produced to us. It has been among the documents
2 that we copied. And if I have missed a letter from
3 counsel asserting that it was privileged, I apologize
4 for that, but right now I have nothing more than your
5 bald assertion that it has been inadvertently
6 produced. And so I'm going to go forward because I
7 do believe it is appropriate impeachment as allowed
8 by the stipulated order and signed by the court.

9 MR. SVOBODA: Well, Ms. Wivell, we can
10 confirm one way or the other whether I am in fact
11 correct or not correct. I always grant the
12 possibility that I'm wrong, and that's entirely the
13 possibility here. However, until we do that, which
14 will take about 10 minutes, we can certainly go on to
15 something else. And that's not a terrible
16 inconvenience for you or anyone else in this room --

17 MS. WIVELL: Well I'm sorry, you're not
18 going to tell me how do conduct my deposition, Mr.
19 Svododa.

20 MR. SVOBODA: Please don't -- please, Ms.
21 Wivell, please don't interrupt me. I will never
22 interrupt you, I can guarantee that. Please don't
23 interrupt me.

24 It's not a terrible inconvenience for you. I'm
25 not telling you how to run your deposition, I am

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1 requesting that you do that. Otherwise the problem
2 will have to be resolved in a different way, which is
3 perhaps by calling the court, which will, of course,
4 take more than 10 minutes anyway. So as a
5 consequence, if you look at it in a practical way,
6 what I'm asking is entirely reasonable and is the
7 same sort of courtesy which I would expect that you
8 would demand or garner if in fact you were requesting
9 of me a 10-minute delay to determine whether I'm
10 right or not. Is that -- is that too much to ask?

11 MS. WIVELL: My deposition is not being
12 taken here. I'm the one who's being asked to be
13 inconvenienced.

14 Now I will go on if you will tell me that it
15 will be 10 minutes, but in 10 minutes I'm coming back
16 to this subject, Jerry.

17 MR. SVOBODA: That's fine.

18 MR. SCHNEIDER: I just want --

19 MR. SVOBODA: Thank you.

20 MR. SCHNEIDER: I just want to note that I
21 join in the objection, particularly with respect to
22 all that was said. But in addition, the portion
23 concerning showing the witness documents that have
24 not been previously designated, we believe that that
25 is not in compliance with the court's order. We do

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1 not agree that that is proper impeachment evidence.
2 We do not agree with your statements in that regard,
3 and would ask again if you have any additional
4 documents that you intend to show this witness, that
5 you provide them to us so that we can facilitate this
6 deposition.

7 MS. WIVELL: Mr. Schneider, I have before
8 me the stipulated order from the parties which allows
9 the use of deposition -- at depositions of genuine
10 impeachment which are not subject to the
11 pre-designation requirement of the court's order of
12 March 20th, 1996.

13 MR. SCHNEIDER: We disagree.

14 BY MS. WIVELL:

15 Q. Sir, isn't it true that as a result of concerns
16 over documents being produced in court which could be
17 damaging to Brown & Williamson, that procedures were
18 established at Brown & Williamson where documents
19 received from B.A.T. companies would be kept out of
20 the R&D library?

21 A. Would you please repeat your question.

22 Q. Certainly.

23 Isn't it true that as a result of concerns over
24 documents being produced in court which could be
25 possibly damaging to Brown & Williamson, that

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1 procedures were established at Brown & Williamson
2 where documents received from B.A.T. companies would
3 be kept out of the R&D library?

4 MR. SCHNEIDER: Object to the form.

5 A. I think I can respond to that by saying that it
6 is my understanding, as indeed circumstances have
7 been described in our interrogatory response, that
8 consideration was given to, A, to have surplus
9 documents removed from the library because they're
10 not needed on an active basis, B, to -- at some time
11 in the early '80s to review the necessity for Brown &
12 Williamson to receive research from other B.A.T.
13 companies in which it was not interested in following
14 for business reasons, and indeed there were other
15 circumstance where reports were directed which would
16 normally have been given to Brown & Williamson
17 through outside counsel for the provision of legal
18 advice. Those circumstances are included in the
19 interrogatory response. There may be other
20 circumstances which, after due diligence, Brown &
21 Williamson has not been aware, but it has undertaken
22 due diligence and has in good faith produced evidence
23 of documents which are the only copy of
24 smoking-and-health and advertising, marketing,
25 promotion documents which may have been destroyed,

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1 but it is not aware of circumstances not included in
2 its interrogatory response, but if it does become
3 aware, then the response may be supplemented at a
4 later date, as indicated in the response.

5 MS. WIVELL: Move to strike as
6 non-responsive.

7 Q. Sir, isn't it true that as a result of concerns
8 over documents being produced in court which could
9 possibly be damaging to Brown & Williamson, that
10 procedures were established in the mid-'80s at Brown
11 & Williamson where documents received from B.A.T.
12 companies would be kept out of the R&D library?

13 MR. SCHNEIDER: Object to the form, asked
14 and answered, misleading, outside the scope.

15 A. I --

16 My response to that is that some circumstances
17 have been included in the interrogatory response
18 where Brown & Williamson did take steps not to
19 receive certain scientific research, and those
20 circumstances are described in the response.

21 (Plaintiffs' Exhibit 80 was
22 marked for identification.)

23 BY MS. WIVELL:

24 Q. Sir, showing you what's been marked as
25 Plaintiffs' Exhibit 80, it is a memo Bates numbered

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1 512101154; correct?

2 A. That's correct.

3 Q. And it is a memo from Earl Kohnhorst to Dr.

4 Esterle with a carbon copy to M. L. Reynolds;

5 correct?

6 MR. SCHNEIDER: Object to the form.

7 A. Could you repeat that, please.

8 Q. Certainly.

9 It's a memo from Earl Kohnhorst; correct?

10 A. Yes, it is.

11 Q. So Dr. Esterle with a copy to M. L. Reynolds;

12 right?

13 A. That's correct.

14 Q. Now sir, this -- the subject of this is "REPORT

15 DISTRIBUTION;" correct?

16 A. That's correct.

17 Q. Now this particular document was not referenced

18 in the interrogatory answers; was it?

19 A. It is my understanding that this document

20 references a matter of how reports are to be

21 distributed internally within Brown & Williamson, and

22 therefore it was not necessary to report in the

23 interrogatory response which was about routing of

24 documents in such a way that they're not received by

25 Brown & Williamson.

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1 Q. Well sir, the document --

2 The interrogatory also covers document transfers
3 too; doesn't it?

4 MR. SCHNEIDER: Object to the form.

5 A. I'm not --

6 I don't know that it does cover document
7 transfers.

8 Q. All right. Well let me ask you this: Mr.
9 Esterle and Mr. Kohnhorst are two of the people who
10 were inadvertently left off the list of 77 people who
11 were interviewed about the subject of document
12 transfer and document destruction; right?

13 MR. SCHNEIDER: Object to the form.

14 A. It's my understanding that both their names have
15 been included in interrogatory responses. And as I
16 said yesterday, their names were not included in part
17 one of the interrogatory response --

18 MS. WIVELL: Move to strike --

19 A. -- inadvertently.

20 MS. WIVELL: Move to strike as
21 non-responsive.

22 Q. My question is simple and it relates just to the
23 list of 77 names in Exhibit 26. Do you have that in
24 mind?

25 A. I do.

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1 Q. All right. And isn't it true that Mr. Esterle's
2 name and Mr. Kohnhorst's name were two that were
3 inadvertently omitted from that list of names?

4 A. I believe that their names were not included in
5 that listing.

6 Q. Now this document concerns report distribution;
7 doesn't it?

8 A. That's correct.

9 Q. And it says that the procedures for receiving
10 external reports from the research centers has been
11 changed; right?

12 A. That's correct.

13 Q. Now the research centers are the B.A.T.-related
14 companies; aren't they?

15 A. That's correct.

16 Q. Now it says here that basically if there is any
17 sensitive issue in any of those reports, they should
18 be reviewed with Kendrick Wells before they're put in
19 the library system; right?

20 MR. SCHNEIDER: Object to the form.

21 A. Could you repeat the question, please.

22 Q. Well let me rephrase it.

23 The document says, quote, "You should pay
24 particular attention to any sensitive issues...." Am
25 I correct so far?

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1 A. Yes, you are.

2 Q. And it says, "...in those cases" -- in other
3 words, cases where there were sensitive issues in the
4 report that B&W is receiving from the BAT Co
5 companies -- when you have those concerns, you should
6 review them with Mr. Wells before they're submitted
7 to the library system; right?

8 MR. SCHNEIDER: Object to the form.

9 A. It says approximately that.

10 Q. And then it says, "In addition, please call to
11 my attention any reports you believe should not be
12 held in the library;" right?

13 A. That's correct.

14 Q. Now when Mr. Kohnhorst was interviewed in
15 response -- or I'm sorry. Let me begin again.

16 When Mr. Kohnhorst was interviewed to determine
17 whether he knew anything about the interrogatory
18 answers that were filed by B&W February 11th of this
19 year, was he asked about this document?

20 MR. SCHNEIDER: Object to the form.

21 A. As I indicated, I have not prepared myself as to
22 the content of more than 77 interviews that were
23 conducted in the preparation of this interrogatory
24 response. I cannot tell you what the nature of that
25 interview with Mr. Kohnhorst was.

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1 Q. Well, did counsel tell you that I specifically
2 asked that you did educate yourself about the subject
3 matter of those 77 interviews?

4 A. It is my understanding that you did write a
5 letter to counsel very, very recently on that, that
6 issue.

7 Q. And in that letter I said that I really thought
8 it was important that you acquaint yourself with the
9 subject matter of those 77 interviews; didn't I?

10 A. I don't know that.

11 Q. Did you see the letter?

12 A. I did not.

13 Q. Did counsel tell you that I wanted you to become
14 knowledgeable about what B&W had found out in those
15 77 interviews?

16 A. I would not characterize my knowledge about this
17 as -- as -- in that way. I was aware that they had
18 received that -- that letter from you.

19 Q. And -- and you were aware that I had requested
20 in that letter that you do get up to speed and become
21 knowledgeable about the facts in those 77 interviews;
22 right?

23 A. I believe that's correct.

24 Q. And you chose not to; is that right?

25 MR. SCHNEIDER: Object to the form.

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1 A. It is my understanding that I've come here today
2 to be deposed on the facts that Brown & Williamson
3 knew relative to the -- the document-retention issue
4 as indicated in the interrogatory response. I have
5 not acquainted myself with every single interview and
6 every single fact known by Brown & Williamson
7 employees about document-retention issues, and nor do
8 I think it would be reasonable for me to have -- have
9 to do that.

10 MS. WIVELL: Move to strike as
11 non-responsive.

12 Q. Sir, you did not acquaint yourself with the
13 facts in the 77 interviews; did you?

14 MR. SCHNEIDER: Objection, asked and
15 answered, argumentative.

16 A. I -- I did acquaint myself with certain facts
17 relating to document destruction and routing as laid
18 out in the interrogatory response, so certain facts I
19 am acquainted with. Other facts are not germane, not
20 pertinent, and I've not prepared myself to -- to know
21 those facts for this deposition.

22 Q. Just so the ladies and gentlemen of the jury can
23 be clear about this, then, you knew you were coming
24 here to testify about the interrogatories; right?

25 A. I did.

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1 Q. You knew that the interrogatories contained
2 reference to facts learned from 77 different Brown &
3 Williamson employees; right?

4 A. I did.

5 MR. SCHNEIDER: Objection to the form.

6 Q. And you chose not to acquaint yourself or
7 educate yourself about the facts those 77 different
8 people gave to Brown & Williamson's lawyers in
9 preparation for -- of that interrogatory; right?

10 MR. SCHNEIDER: Objection to the form.

11 A. My response is that I could not possibly have
12 reperformed 77 interviews and undertaken inquiries
13 along the same lines as outside counsel, and I did
14 not do that.

15 Q. Oh. And you understood I didn't ask that you
16 reinterview 77 people. You understand I didn't ask
17 that; don't you?

18 A. No, I did not understand that.

19 Q. You understand that I asked that you read the
20 interview notes and make them available at this
21 deposition; didn't you?

22 MR. SCHNEIDER: Object to the form.

23 A. I don't understand that, no. That's -- that's
24 not correct.

25 Q. Did you understand that I wrote, and I quote,

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1 "So there is no misunderstanding, at this deposition
2 we expect to cover all aspects of document
3 transfer/destruction since that was the subject of
4 plaintiffs' interrogatories and defendants' answers
5 dated February 11th, 1997." Did you understand that
6 would be what we would be talking about today?

7 MR. SCHNEIDER: Object to the form.

8 A. My understanding is that I am to talk about the
9 facts as contained in the interrogatory response.

10 Q. Yes. And the 77 individuals who were listed in
11 that response were interviewed, there were notes of
12 them, and you just chose not to read them; right?

13 MR. SCHNEIDER: Objection to the form and
14 specifically object to the extent that you're trying
15 to inquire into the work-product activities of the
16 lawyer and the lawyer -- attorney-client privilege
17 discussions.

18 A. I did not review any interview notes. I don't
19 know the extent to which interview notes were taken.
20 I know some were. And I did not believe it was
21 necessary for me to review those in preparation for
22 this day, and nor have I seen any interview notes.

23 Q. So with regard to that portion of the
24 interrogatory answer, you're just not suitably
25 informed enough to talk about what those 77 people

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1 knew; right?

2 MR. SCHNEIDER: Objection to form.

3 A. I believe I have prepared today to talk about
4 some of the facts those people knew which have been
5 included in this interrogatory response. I'm not
6 prepared to talk about all the facts that those
7 people knew, some of which are not relevant in this
8 case.

9 Q. Okay. But you knew that the subject of document
10 transfer was relevant because that's part of the
11 subject of the interrogatory; correct?

12 MR. SCHNEIDER: Objection to the form,
13 outside the scope.

14 A. I don't believe that transfer is an issue on
15 which I am being deposed at -- at this time.

16 Q. So you are just unprepared to talk about
17 document transfers like that talked about in Exhibit
18 80.

19 MR. SCHNEIDER: Object to the form,
20 misleading.

21 A. It's my understanding that this -- this Exhibit
22 80 does not reference document transfers, it's my
23 understanding that it references distribution of
24 external reports within Brown & Williamson.

25 Q. Well isn't a transfer of a document from BAT Co

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1 to Brown & Williamson a transfer?

2 A. It's my understanding that in earlier
3 interrogatories the issue of transfer has been -- the
4 question of documents which may have been --
5 allegedly been sent from Brown & Williamson to
6 affiliates or third parties for purposes of indexing,
7 destruction, various other issues, I've not prepared
8 myself for that -- that topic today, but I think it
9 was in connection with Brown & Williamson's transfer
10 and -- and not in relation to other companies, for
11 whom I cannot speak.

12 Q. Sir, isn't it true that at or around the time
13 that this document, Exhibit 80, was written, that
14 Brown & Williamson established shredders on each one
15 of the floors of the Brown & Williamson Tower?

16 MR. SCHNEIDER: Objection to the form,
17 argumentative, misleading.

18 A. I don't recall the -- the -- the date of the
19 establishment of shredders in the Brown & Williamson
20 Tower. I do know that shredders were made available
21 and that clearly Brown & Williamson has taken steps
22 to -- to destroy documents that it is not required to
23 retain from time to time, and shredders were placed
24 for that purpose.

25 (Plaintiffs' Exhibit 81 was marked

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- 1 for identification.)
- 2 BY MS. WIVELL:
- 3 Q. Sir, showing you what's been marked as
- 4 Plaintiffs' Exhibit 81, it is a document dated April
- 5 30th of 1985; correct?
- 6 A. That's correct.
- 7 Q. Bates numbered 512102141-42; correct?
- 8 A. That's correct.
- 9 Q. And this is a Brown & Williamson document to all
- 10 vice-presidents from W. L. DeWitt; correct?
- 11 A. That's correct.
- 12 Q. And it talks about in part, on the
- 13 second-to-the-last paragraph of the last page, the
- 14 fact that documents -- I'm sorry, the fact that
- 15 shredders will soon be installed on each floor in the
- 16 B&W Tower and made available to other locations as
- 17 requested; correct?
- 18 A. I'm sorry, where -- where were you referencing?
- 19 Q. The first sentence of the second-to-the-last
- 20 paragraph.
- 21 A. Yes, indeed.
- 22 Q. And it says, "Shredders will soon be installed
- 23 on each floor in the B&W Tower and made available to
- 24 other locations as requested;" correct?
- 25 A. That's correct.

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1 Q. Now this document is dated within approximately
2 15 days of the document concerning report
3 distribution that we looked at which was Exhibit 80;
4 right?

5 A. That's correct.

6 Q. And sir, isn't it a fact that documents such as
7 the "Secret - U.S. Interntional Brand Strategies"
8 which are mentioned on that same page were shredded
9 by Brown & Williamson as part of its regular course
10 of business?

11 MR. SCHNEIDER: Objection to the form,
12 misleading, misstates what the document says.

13 A. It's my understanding that this document is a
14 report on the results of some checks undertaken by
15 auditors to review accessibility to documents, many
16 of which the Brown & Williamson -- which Brown &
17 Williamson had concerns could be used by competition
18 to provide them with an unfair advantage in the
19 marketplace. Brown & Williamson has always treated
20 confidentiality of its documents as an important
21 issue, and this -- this document is evidence of some
22 checks that were undertaken in the normal course of
23 business to make sure that people were in compliance
24 with its general standards of -- of that type.

25 MS. WIVELL: Move to strike as

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1 non-responsive.

2 Q. My question is, sir: Isn't it a fact that
3 documents such as the one referred to at the top of
4 the page, "Secret - U.S. Interntional Brand
5 Strategies," were shredded in the regular course of
6 business at Brown & Williamson in the mid-'80s?

7 MR. SCHNEIDER: Objection to the form.

8 A. It's my understanding this document indicates
9 that that document had been discarded in a waste
10 basket, and the concern was that that could fall into
11 competition hands. It is also my understanding that
12 Brown & Williamson has had a long-time policy of
13 retaining documents which are required for legal, tax
14 and business purposes. That does not mean to say
15 that every single copy of every single document
16 relating to marketing through all -- at all times is
17 required to be retained and may not be destroyed.
18 And in fact there's evidence that this report has
19 been destroyed, but I don't see anything sinister in
20 that.

21 Q. Sir, I'm not implying anything sinister. My
22 question is simple. Let me restate it.

23 Isn't it a fact that documents such as the one
24 referenced at the top of the page, "Secret - U.S.
25 Interntional Brand Strategies," were shredded in the

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1 regular course of business at Brown & Williamson in
2 the mid-'80s?

3 MR. SCHNEIDER: Objection to the form.

4 A. Over the years Brown & Williamson has destroyed
5 many documents; otherwise, we would be swamped in
6 storage areas. I'm absolutely certain that we have
7 destroyed documents such as "U.S. International Brand
8 Strategies," and in the process of destroying that we
9 would hope that they're shredded because documents
10 like this could be very useful to the competition.

11 Q. Sir, the document "Secret - U.S. Interntional
12 Brand Strategies" was not kept and produced to the
13 plaintiffs in this litigation; was it?

14 MR. SCHNEIDER: Objection to the form.

15 A. I do not know.

16 Q. Well if it --

17 If Brown & Williamson had it, it should have
18 been produced to the plaintiffs in this litigation;
19 wouldn't you think?

20 MR. SCHNEIDER: Objection to the form,
21 argumentative, misleading.

22 A. I do not know whether a document of this nature
23 would be responsive in this case.

24 Q. Well sir, let me tell you this: I have made a
25 good-faith effort to try and find this document. Can

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1 you explain to me why it would not be produced to us
2 if Brown & Williamson had kept this document?

3 MR. SCHNEIDER: Object to the form,
4 misleading.

5 A. I think that this document, if it were
6 responsive -- and Brown & Williamson has collected
7 documents over the years and indeed as part of
8 preparation to deal with the discovery in this case
9 has reviewed on a document-by-document basis huge
10 quantities of documents retained for responsiveness
11 on a document-by-document basis -- if this document
12 were reviewed in that -- in that process and were
13 determined to be responsive, it would have been
14 produced unless it were inadvertently missed.

15 Q. Or unless it were destroyed; correct?

16 A. Clearly if a document had been destroyed in
17 earlier years and were not on hand, it could not be
18 produced.

19 Q. And just so we're clear here, the policy -- the
20 policy of establishing legal holds at Brown &
21 Williamson only was established in 1990; wasn't it?

22 MR. SCHNEIDER: Object to the form.

23 A. I don't believe that's correct. It's my
24 understanding that Brown & Williamson during earlier
25 periods put employees on notice from time to time

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1 when legal holds were in place that this was well
2 understood by employees in the company, but that the
3 formal policy of document retention was not actually
4 implemented until 1990. And nevertheless, prior to
5 that time legal holds were communicated and adopted
6 within the company.

7 Q. Sir, you testified yesterday that in 1990 the
8 policy of holding documents for legal reasons was
9 formalized; correct?

10 A. That's correct.

11 Q. Can you direct us to any document that suggests
12 that documents relating to smoking and health were
13 placed on legal hold prior to, say, 1989?

14 MR. SCHNEIDER: Objection to the form,
15 misleading.

16 A. It is my understanding that memoranda have been
17 found which indicate that legal holds have been
18 communicated within the company prior to 1989. I
19 can't point you to a specific example at this time.

20 Q. Well actually there was an example that was
21 attached as a document to the -- an exhibit to the
22 interrogatory answers, but that didn't relate to a
23 smoking-and-health-related legal hold; did it?

24 MR. SCHNEIDER: Object to the form.

25 A. Could you repeat the question, please.

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1 Q. Certainly.

2 There was a document concerning a legal hold
3 that was produced as an exhibit, I believe it's
4 Exhibit 2 to the interrogatories that are the subject
5 matter of this deposition. That legal hold did not
6 apply to a smoking-and-health-related case; did it,
7 sir?

8 A. It's my understanding that was relative to a
9 price-fixing case, that's correct.

10 Q. That's right.

11 MS. WIVELL: Why don't we mark that as the
12 next exhibit.

13 (Plaintiffs' Exhibit 82 was marked
14 for identification.)

15 BY MS. WIVELL:

16 Q. Sir, showing you what's been marked as
17 Plaintiffs' Exhibit 82, that's the legal-hold-related
18 document that is Exhibit 2 to the interrogatory
19 answers which we've -- which Brown & Williamson
20 filed; correct?

21 A. I believe that's correct.

22 Q. Now sir, Brown & Williamson also produced
23 another document from Kendrick Wells dated February
24 7th, 1986 related to document retention; correct?

25 A. That's correct.

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1 Q. Now that document does not say that all
2 smoking-and-health-related documents should be
3 retained for legal holds; does it?

4 MR. SCHNEIDER: Objection to the form.

5 A. The document that you're referencing dated
6 February 1986 from Mr. Wells indicates that records
7 shall be placed in storage because of pending
8 litigation; it does not spell out that's relating to
9 smoking and health, but it would be my understanding
10 that that was generally understood within the
11 company.

12 Q. Well sir, this document didn't even go to the
13 R&D department; did it?

14 MR. SCHNEIDER: Object to the form.

15 A. I don't know to whom it was addressed.

16 Q. Well let's look at the top of the page. Who's
17 Darrell Lawrence?

18 A. I do not know.

19 Q. Who is I. Terry?

20 A. I don't know.

21 Q. Who is C. Heger?

22 A. Mr. Heger was at one time the CFO at Brown &
23 Williamson.

24 Q. How about Ernie Pepples, he was a lawyer; right?

25 A. That's correct.

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1 Q. And Sachs was a lawyer; right?

2 A. I believe that's correct.

3 Q. This document didn't go to anybody at R&D; did
4 it?

5 MR. SCHNEIDER: Object to the form.

6 A. That's correct.

7 Q. Didn't go to Mr. Kohnhorst; right?

8 A. It's my understanding that this memo is a
9 response to an inquiry raised by Mr. Lawrence, and
10 there was no reason to copy it to R&D.

11 Q. Ah. Because R&D wasn't told that all of their
12 files should go into storage or be kept because of
13 litigation. Was that department told that?

14 MR. SCHNEIDER: Object to the form.

15 MS. WIVELL: I object to that form, too.
16 Let me start again.

17 Q. R&D wasn't told that all of their files should
18 be stored; correct?

19 MR. SCHNEIDER: Object to the form.

20 A. It's my understanding that at this time,
21 February 1986, Brown & Williamson swept all its
22 documents for litigation purposes. It is my
23 understanding that R&D documents were the first
24 documents that were swept. And indeed, it was well
25 known throughout the company that documents of that

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1 nature should be retained and placed on hold.

2 It's my understanding that this memorandum was
3 written to an individual who is not in R&D in
4 response to his request as to what he could do with
5 huge amounts of records which were being collected in
6 storage. The advice given to him was that because of
7 pending litigation they should all be retained.

8 MS. WIVELL: Move to strike as
9 non-responsive.

10 Q. Sir, my question was: R&D was not told that all
11 of their files should be stored; were they?

12 MR. SCHNEIDER: Objection to the form,
13 asked and answered, argumentative, misleading,
14 misstates the record.

15 A. It is my understanding that employees within R&D
16 in the 1986 period would have had a good
17 understanding that their records should be retained,
18 and over -- over the years that understanding has
19 been in R&D. This particular memo does not -- was
20 not communicated to R&D, and there was no reason to
21 do so.

22 MS. WIVELL: All right. Let's mark the
23 memo you and I have been talking about.

24 (Plaintiffs' Exhibit 83 was marked
25 for identification.)

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1 BY MS. WIVELL:

2 Q. Sir, showing you what's been marked as
3 Plaintiffs' Exhibit 83, it's the memo you and I have
4 just been discussing from Kendrick Wells dated
5 February 7th, 1986 to Darrell Lawrence regarding
6 records retention; correct?

7 A. That's correct.

8 Q. This is a B&W document; right?

9 A. Yes, it is.

10 Q. It doesn't have a Bates number; does it?

11 A. It appears not to.

12 Q. And that means that it was not produced in the
13 Minnesota depository; correct?

14 MR. SCHNEIDER: Objection to form.

15 A. I don't know whether this document was produced
16 or not.

17 Q. And just so we're clear here, this document does
18 not tell R&D that it should not destroy any
19 documents; right?

20 MR. SCHNEIDER: Object to the form.

21 A. This document was not issued to the R&D
22 department, that's correct.

23 Q. And sir, you cannot point to and you don't have
24 with you a single document that directs R&D not to
25 destroy its files in this mid-1980s period.

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1 MR. SCHNEIDER: Object to the form.

2 A. I can't point you to a specific document. I am
3 aware, as I said earlier, that Brown & Williamson's
4 files were swept, and all these documents in the R&D
5 area were the first documents that were collected at
6 this time in late 1985, early 1986. As part of that
7 sweep procedure I'm sure that people within R&D would
8 have been aware of that, and awareness within the
9 company about smoking-and-health issues had been high
10 at that time, but this specific document was not
11 passed to R&D.

12 Q. Sir, isn't it true that this sweep that you have
13 been referring to several different times was for the
14 purpose of collecting documents to help Brown &
15 Williamson defend itself in litigation?

16 MR. SCHNEIDER: Object to the form.

17 A. It is my understanding that the sweep was taken
18 and -- and has been -- other sweeps have been done
19 from time to time for the purposes of preparing Brown
20 & Williamson for potential litigation. As a matter
21 of efficiency it -- it's done to collect documents in
22 one place rather than having to keep going back from
23 time to time as other litigation takes place, and
24 it's not taken to -- for the pure purpose of
25 defending Brown & Williamson --

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1 MS. WIVELL: Move to strike --

2 A. -- but for discovery purposes too.

3 MS. WIVELL: Move to strike as

4 non-responsive.

5 Q. Sir, isn't it true that the sweep that you were

6 referring to that was done at the time of this memo

7 in the mid-'80s was done for the purpose of

8 collecting documents to help Brown & Williamson

9 defend itself in litigation?

10 MR. SCHNEIDER: Objection to the form,

11 asked and answered.

12 A. And my response, I believe, is that Brown &

13 Williamson conducted these sweeps as a matter of

14 efficiency to prepare itself for future litigation,

15 including its defense and in order to prepare for

16 discovery requests of plaintiffs.

17 Q. Sir, have you read Kendrick Wells' -- no, let me

18 start again.

19 You didn't take part in these sweeps; did you?

20 A. I was not employed by Brown & Williamson in

21 1985, 1986. No, I did not.

22 Q. Have you talked with Kendrick Wells, who was

23 employed at the time and who was responsible for

24 product-liability-litigation document production,

25 about why these sweeps were done?

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1 A. I have had conversations with Ernest Clements
2 who was involved in those sweeps at the time. I have
3 not discussed these sweeps with Mr. Wells.

4 Q. All right. Ernest Clements is a legal
5 assistant; right?

6 A. That's correct. Or paralegal I believe.

7 Q. Paralegal. Not a lawyer.

8 A. I believe he is a paralegal.

9 Q. And Mr. Wells was the person at Brown &
10 Williamson responsible for the document productions
11 in the mid-'80s; correct?

12 MR. SCHNEIDER: Objection to the form.

13 A. I don't know exactly what Mr. Wells' specific
14 responsibilities were in the mid-'80s.

15 Q. Well when you talked to him, did you ask him
16 about the document sweeps?

17 A. I did not.

18 Q. And if Mr. Wells had testified that those
19 document sweeps were done for the purpose of
20 collecting documents to defend Brown & Williamson,
21 you're just unaware of that; is that right?

22 MR. SCHNEIDER: Object to the form.

23 A. I don't know what Mr. Wells has -- has indicated
24 in his earlier testimony.

25 Q. So in your preparation for today's deposition

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1 you didn't read Mr. Wells' testimony to that effect?

2 A. I don't believe I had -- I did.

3 MS. WIVELL: All right. Why don't we go
4 off the record for a moment.

5 THE REPORTER: Off the record, please.

6 (Recess taken.)

7 (Exhibit 19 was handed to the witness.)

8 BY MS. WIVELL:

9 Q. Sir, during the break I had the reporter hand
10 you Plaintiffs' Exhibit 19; correct?

11 A. That's correct.

12 Q. This is a deposition of Kendrick Wells taken
13 September 8th, 1994 in the Maddox case; right?

14 A. I can confirm the date. I --

15 Yes, it looks like it's the Maddox case.

16 Q. I ask you to turn to page 35. Do you have it?

17 A. I do.

18 Q. And sir, do you say -- see there a discussion
19 that Mr. Wells -- I'm sorry, let me start again.

20 Do you see there Mr. Wells answering a question
21 where he gives information about the sweep that was
22 done in the mid-'80s?

23 A. I have read his -- his answer.

24 Q. All right. And you see there that he's talking
25 about hiring the law firms to sweep the files of

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1 Brown & Williamson; correct?

2 A. That's correct.

3 Q. And he said that he did so -- or Brown &
4 Williamson did so so that the lawyers could, quote,
5 "prepare" -- I'm sorry, I -- let me -- strike
6 that. Let me begin again.

7 Do you see there where he says we employ the law
8 firms to select documents from our files that would
9 be useful in a broad sense, relevant in a broad
10 sense, to the preparation of defense of product
11 litigation?

12 A. Yes, I do.

13 Q. And he goes on to say that they hire -- Brown &
14 Williamson hired lawyers to, quote, "help us in
15 defending product litigation;" correct?

16 A. I think that that sentence or that paragraph or
17 that -- that comment of Mr. Wells was in connection
18 with identifying the kinds of documents that were
19 collected and not necessarily restricted to one case.

20 Q. Fair enough. But the kinds of --

21 The type of documents that the lawyers selected
22 in the sweeps in the mid-'80s were the documents that
23 they thought would be helpful in defending product
24 litigation; right?

25 MR. SCHNEIDER: Object to the form.

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1 A. And as Mr. Wells said, in a broad sense that's
2 correct.

3 Q. And he went on to say that Brown & Williamson
4 expected its counsel, in selecting documents, to
5 select documents they believe are within the broad
6 range of preparing to defend the litigation; right?

7 MR. SCHNEIDER: Object to the form.

8 A. It does say that, yes.

9 Q. Now sir, he did not say that they were trying to
10 find all relevant documents relating to smoking and
11 health or marketing of cigarettes; did he, sir?

12 A. It's my understanding that Mr. Wells' response
13 indicated that documents were selected in a broad
14 sense in preparation of defense of product
15 litigation, and that it was done not for a single
16 case but on a broad basis. So in my view that's -- a
17 broad sweep of -- of documents relating to smoking
18 and health would -- would have been done in that
19 time.

20 Q. And the documents which would have been selected
21 to be kept were those documents which they believed
22 would be helpful in preparing to defend the
23 litigation; correct?

24 MR. SCHNEIDER: Object to the form,
25 misleading.

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1 A. Obviously, documents which will be presented as
2 evidence in a court case are reviewed as a matter of
3 preparing the defense for Brown & Williamson and
4 reviewed by plaintiffs for the other side. Obviously
5 they're used by Brown & Williamson for defense
6 purposes and also for discovery purposes. That was
7 the -- the reason for conducting these sweeps.

8 Q. Sir, you don't know that for a fact; do you?

9 MR. SCHNEIDER: Object to the form.

10 A. It is my understanding that that was the reason
11 for the -- for this -- the document sweeps.

12 Q. And you haven't gotten that information from
13 anyone who has first-hand knowledge about what Mr.
14 Wells thought about this document production; right?

15 MR. SCHNEIDER: Objection to the form.

16 A. I have not inquired into the interview with Mr.
17 Wells, as I indicated earlier.

18 Q. And you didn't talk to Mr. Wells about the
19 purpose for the document sweep in the mid-'80s; did
20 you?

21 A. I did not.

22 Q. And so you, as you sit here today, have no
23 individual knowledge that contradicts Mr. Wells when
24 he says that the lawyers selected those documents
25 that would be helpful to -- and I quote -- "defend

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1 the litigation;" correct?

2 MR. SCHNEIDER: Object -- objection to the
3 form, misquotes even the deposition of Mr. Wells,
4 misstates the record, argumentative, asked and
5 answered, misleading.

6 A. My response to that is that I did talk to Ernest
7 Clements who was -- was directly involved in sweeps
8 of Brown & Williamson's files in 1985, 1986, and it
9 is my understanding that a very thorough sweep was
10 undertaken, and I don't believe that any knowledge I
11 have is in contradiction with anything said by Mr.
12 Wells.

13 Q. Sir, you haven't talked to any lawyer -- strike
14 that.

15 Did Mr. Clements tell you that Brown &
16 Williamson attempted to find every relevant document?

17 A. Mr. Clements told me that he was always amazed
18 at the extent and the trouble that Brown & Williamson
19 took to ensure that it retained documents. It went
20 through, I think his -- his -- his terms were
21 unbelievable hoops in connection with some of the
22 activities it undertook to clear out unnecessary
23 documents, to make sure that it did not dispose of
24 documents which may be responsive in the future. And
25 based on -- on that, my understanding is that Brown &

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1 Williamson has always done an excellent job in
2 retaining documents.

3 Q. Sir, my question --

4 MS. WIVELL: I move to strike as
5 non-responsive.

6 Q. Did Mr. Clements tell you that Brown &
7 Williamson attempted to find every relevant
8 document?

9 MR. SCHNEIDER: Objection to the form.

10 A. It's my understanding that these sweeps were
11 taken on a broad basis without -- with --

12 "Relevant documents" is a definition that
13 varies from time to time depending on what litigation
14 is pending. These sweeps were undertaken with a view
15 to select documents on a broad basis which may be
16 relevant in future litigation.

17 Q. Well sir, that's not what Mr. Wells said in his
18 sworn testimony; did he?

19 MR. SCHNEIDER: Objection to the form.

20 Q. He said that documents were collected to help
21 prepare to defend the litigation; didn't he, sir?

22 MR. SCHNEIDER: Objection to the form,
23 misleading.

24 A. He said that documents were selected that would
25 be useful in a broad sense. He did say that one of

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1 the reasons for doing that was to prepare a defense,
2 and that is perfectly -- that's perfectly normal in,
3 you know, the normal course of defending yourself
4 against allegations.

5 Q. And in the broad sense, since I've accused --
6 been accused of being misleading, did he not say,
7 quote, "...we expect our counsel in selecting
8 documents to select documents they believe were
9 within the broader area of preparing to defend the
10 litigation," close quote?

11 MR. SCHNEIDER: Object to the form,
12 misleading, doesn't read Mr. Wells' entire statement.

13 A. Could you repeat the question, please?

14 Q. Certainly.

15 And in the broad sense, did he not say, quote,
16 "...we expect our counsel in selecting documents to
17 select documents they believe were within the broader
18 area of preparing to defend the litigation," close
19 quote?

20 A. I haven't yet found that -- that part of your
21 question.

22 Q. Take a look at line 21 through 23.

23 A. Thank you.

24 Q. Does it not say at line 21, "But we expect our
25 counsel in selecting documents to select documents

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1 they believe were within the broader area of
2 preparing to defend the litigation?"

3 A. Yes, it does.

4 Q. Sir, and you mentioned that Mr. Clements said
5 the rest of the documents were cleared out; right?

6 MR. SCHNEIDER: Objection to the form.

7 A. I don't recall that.

8 Q. Well sir, isn't it true that the rest of the
9 documents, the ones that weren't selected, many, many
10 of them went to the shredders?

11 MR. SCHNEIDER: Objection to the form, no
12 time period, ambiguous.

13 Q. Well we're talking the mid-'80s.

14 A. It is my understanding that in the mid-'80s many
15 documents would have been destroyed, and that's part
16 of our -- our usual document-retention policy, to
17 dispose of documents which are not required for
18 legal, tax or business reasons, and I'm sure that was
19 the case in the 1980s.

20 Q. Were records kept of every document that was
21 destroyed?

22 MR. SCHNEIDER: Objection, ambiguous,
23 timeframe.

24 MS. WIVELL: I'll rephrase the question.

25 Q. Were records kept of every document that was

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1 destroyed in this mid-'80s document destruction?

2 MR. SCHNEIDER: Objection to the form,
3 ambiguous.

4 A. I'm not aware of a mid-'80s document
5 destruction that you're referring to. I am aware
6 that during the years Brown & Williamson has
7 destroyed documents that are not required to be kept
8 and it has kept documents that it -- it needs to
9 keep. Other than that, I don't think that it's our
10 normal practice to list every document that is
11 destroyed.

12 Q. So the answer to my question is in the mid-'80s,
13 after the document -- the lawyers had collected those
14 documents they thought would be helpful to defending
15 the litigation, there were not lists of documents
16 which were destroyed which were kept by Brown &
17 Williamson; right?

18 MR. SCHNEIDER: Objection to the form,
19 ambiguous, misleading.

20 A. I don't -- I don't understand your -- your
21 point. Documents were collected in these sweeps and
22 they were included in the database and retained by --
23 by outside counsel, copies of those documents;
24 originals were retained by Brown & Williamson, and if
25 they were -- if they were considered to be on legal

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1 hold, they were retained. And it is my understanding
2 that in -- in the 1980s, documents relating to
3 smoking and health were retained by Brown &
4 Williamson.

5 MS. WIVELL: Sir, move to strike as
6 non-responsive.

7 Q. My question is: In the mid-'80s, after the
8 document sweep where the lawyers went through and
9 collected the documents, documents were destroyed;
10 right?

11 MR. SCHNEIDER: Objection to the form,
12 misleading, misstates the record.

13 A. My understanding is that throughout its history,
14 as a matter of not being buried in paper, people
15 destroy documents from time to time. Brown &
16 Williamson has always been careful not to destroy
17 documents that are on legal hold or are required for
18 legal, tax or business purposes.

19 MS. WIVELL: Sir, move to strike as
20 non-responsive.

21 Q. My question is --

22 Well let me go back. You said Ernie Clements
23 told you that once the documents were collected, that
24 there were other documents that were -- and I think
25 you used the words -- cleaned out; right?

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1 MR. SCHNEIDER: Objection to the form,
2 misleading, misstates the record.

3 A. Let me clarify. I -- I believe you may be
4 referring to an exercise in 1994 rather than in the
5 mid-'80s where Brown & Williamson, as a matter of
6 endeavoring to review its record-retention practices
7 and to bring them into compliance with its policy and
8 to ensure that it had not discarded any documents
9 that are related to smoking and health and were
10 required for tax or business reasons, it went through
11 some exercise to review unnecessary files dating back
12 pre-1988 over -- some time in the late 1990s. It --
13 it undertook some very diligent procedures to ensure
14 that those documents were not necessary to keep
15 before they were destroyed. And -- and that -- that
16 process is called the pilot project basis, I believe.

17 Q. I'm sorry. Didn't you testify that Ernie
18 Clements told you that unbelievable hoops were jumped
19 through in connection with some of the activities
20 Brown & Williamson undertook to, and I quote, "clear
21 out unnecessary documents to make" --

22 Didn't you say that?

23 MR. SCHNEIDER: Objection to the form,
24 ambiguous, timeframe.

25 A. My -- my testimony in that regard was in

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1 relation to the period in the 1990s and not the 1980s
2 when Brown & Williamson undertook to try and resolve
3 excess documents held in storage, many dating to 1988
4 and before, and I was referring to those documents in
5 that -- that effort at that time.

6 Q. Okay. So then going back to my question, if --
7 if what you -- if what Ernie Clements told you about
8 clearing out the documents applies to the 1990s,
9 isn't it true that in the 1980s, in the mid-1980s,
10 Brown & Williamson also destroyed documents after the
11 lawyers had gone through and collected the ones they
12 thought would be helpful to them?

13 MR. SCHNEIDER: Objection to the form,
14 misleading, misstates the record.

15 A. I -- I cannot --

16 I cannot point to every document that has ever
17 been destroyed in Brown & Williamson back in the
18 1980s. I can tell you that my understanding of the
19 procedure was that sweeps were undertaken and copies
20 were made, and those documents were retained by
21 outside counsel for the purposes of being ready for
22 Brown & Williamson's defense and for discovery
23 purposes. It is not my understanding that documents
24 which were swept by outside counsel and copied by
25 them were then destroyed by Brown & Williamson.

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1 Q. Oh, I'm not suggesting that documents which
2 Brown & Williamson's counsel selected for purposes of
3 defending Brown & Williamson in the litigation were
4 destroyed. I'm suggesting that documents were
5 destroyed which counsel decided would not be helpful
6 to them in defending the litigation. Isn't that
7 true, sir?

8 MR. SCHNEIDER: Objection, misleading,
9 timeframe.

10 A. It is -- I -- I don't --

11 Brown & Williamson has always had a policy of
12 retaining documents which are on legal hold or
13 required for tax and business reasons. There may
14 have been circumstances in the years where, through
15 error or inadvertent actions by employees, some
16 documents may have been destroyed. I cannot confirm
17 that.

18 We have undertaken a due diligence review as
19 undertaken by the court order to try and identify
20 circumstances where the only copy of
21 smoking-and-health and advertising, marketing,
22 promotion documents have been destroyed. Some of
23 those circumstances have been included in this
24 interrogatory response.

25 Q. And we know for a fact that certain documents

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1 were sent to Mr. Maddox, Brown & Williamson's
2 counsel, which have not been produced in this
3 litigation; correct?

4 MR. SCHNEIDER: Object to the form.

5 A. In respect of the temporary procedure in 1985 to
6 route B.A.T. research reports through Mr. Maddox, it
7 is my understanding that throughout that period all
8 but three reports have been received by Brown &
9 Williamson and found in Brown & Williamson files.

10 Q. So the answer to the question is yes, there have
11 been documents that were sent during this period from
12 B.A.T.-related companies to Mr. Maddox to be
13 forwarded on to Brown & Williamson which have not
14 been produced in this litigation; isn't that true,
15 sir?

16 MR. SCHNEIDER: Object to the form.

17 A. That is -- that is not my understanding. In
18 fact my understanding is that in respect of those
19 documents which have -- which were not found in Brown
20 & Williamson files, it's my understanding that some
21 of those reports have been made available by other
22 companies within the BAT Group to plaintiffs, but not
23 by Brown & Williamson.

24 Q. So the answer to the question is that
25 B.A.T.-related reports were sent to Mr. Maddox and

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1 not produced by Brown & Williamson in this
2 litigation; correct?

3 MR. SCHNEIDER: Object to the form,
4 misleading.

5 A. No, it's not my understanding. It is my
6 understanding that several reports in this period,
7 which may have been routed through Mr. Maddox or may
8 not, have been found in Brown & Williamson files, and
9 if they were reviewed -- and my belief is that they
10 were reviewed on a document-by-document basis -- and
11 were found to be responsive, they would have been
12 produced. And --

13 Q. Sir, isn't it true that in the response to this
14 interrogatory, Brown & Williamson admits that not all
15 of the reports which Mr. Maddox received have been
16 produced by Brown & Williamson in this litigation?

17 MR. SCHNEIDER: Objection to the form,
18 misleading.

19 A. No. It is my understanding that Brown &
20 Williamson has indicated in the interrogatory
21 response the existence of three reports which, while
22 it cannot be confirmed that they were in fact routed
23 to Mr. Maddox or not, they may have been routed to
24 Mr. Maddox, and they have not been found in Brown &
25 Williamson's files.

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1 Q. And they have not --

2 A. Other than that --

3 Q. -- been produced by Brown & Williamson in this
4 case; have they, sir?

5 A. May I complete my answer?

6 Other than that, other files which -- other
7 reports which may have been routed through Mr. Maddox
8 have been found. And furthermore, those three files,
9 I believe, have been made available to plaintiffs by
10 other companies in the BAT Group.

11 Q. Sir, my question doesn't regard other
12 companies. My question is: Isn't it true that Brown
13 & Williamson has not produced three of the reports
14 which were routed to Mr. Maddox in this litigation?

15 MR. SCHNEIDER: Object to the form, asked
16 and answered, misleading, argumentative, and
17 harassing.

18 A. It is my understanding that your question only
19 asks me whether those reports have been produced in
20 this case, and my understanding is that they -- they
21 have been.

22 Could you repeat your -- the second part of your
23 question?

24 Q. I will repeat the question once again, sir.

25 Isn't it true that Brown & Williamson has not

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1 produced three of the reports in this case which were
2 routed to Mr. Maddox?

3 MR. SCHNEIDER: Objection, asked and
4 answered.

5 A. It's my understanding that Brown & Williamson
6 has listed in the interrogatory response three
7 reports which may or may not have been routed to Mr.
8 Maddox, but they have not been produced by Brown &
9 Williamson.

10 Q. And isn't it also true that Brown & Williamson
11 has not produced 10 reports from -- that it received
12 from BAT Co relating to research that was done from
13 1980 to 1993 which show a distribution to B&W?

14 A. Yes, it's my understanding that from more than
15 700 reports prepared by BAT Co which show
16 distribution to B&W, Brown & Williamson has found all
17 but 10 of those, and those 10 are listed in the
18 interrogatory response.

19 Q. Now isn't it true, sir, that a lot of the
20 reports, Brown & Williamson had to get back from
21 counsel to whom it had transferred those documents so
22 that they could be produced in this case?

23 MR. SCHNEIDER: Objection to the form.

24 A. Will you please repeat the question.

25 Q. Certainly.

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1 Isn't it true that many of the reports which
2 Brown & Williamson did produce, it had to get back
3 from counsel to whom it had transferred those
4 documents?

5 MR. SCHNEIDER: Objection to the form.

6 A. I don't -- I don't know.

7 Q. You just don't know one way or the other; do
8 you, sir?

9 A. I don't know, I just said.

10 Q. But you do know that shredders were installed on
11 every floor of the Brown & Williamson Tower during
12 the mid-'80s; correct?

13 A. It's my understanding that Brown & Williamson
14 was concerned about security over documents and it
15 was concerned about the fact that confidential
16 documents could fall into the hands of third parties
17 and competitors, and it introduced the shredders to
18 avoid such unfortunate circumstances.

19 Q. How many floors are in the B&W Tower?

20 A. There are 26 floors.

21 Q. So there were --

22 There was a shredder on every floor and there
23 was also a bulk shredder in the basement to do large
24 numbers of documents; correct?

25 A. I believe that's correct.

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1 (Plaintiffs' Exhibit 84 was marked
2 for identification.)

3 BY MS. WIVELL:

4 Q. Sir, showing you what's been marked as
5 Plaintiffs' Exhibit 84, this is a Brown & Williamson
6 document dated May 14th, 1985 from George Glassner
7 regarding destruction of confidential material;
8 correct?

9 A. No, I believe it's dated May the 10th, 1985.
10 But in other respects you're correct.

11 Q. All right. Well let me start again.

12 This is a document which is a Brown & Williamson
13 document dated May 10th, 1985 from George Glassner
14 regarding destruction of confidential material;
15 correct?

16 A. That's correct.

17 Q. And it refers to the addition of a basement
18 shredder that's capable of shredding bulk amounts of
19 paper per hour; right?

20 A. That's correct.

21 Q. And in fact this document also says that if a
22 department wants to destroy sensitive documents in
23 even larger quantities, that arrangements had been
24 made for document shredding at the Kentucky Document
25 Shredding company; right?

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1 A. The language --

2 MR. SCHNEIDER: Object to the form.

3 A. The language used by Mr. Glassner has reference
4 to confidential data, but it -- other than that,
5 you're correct.

6 Q. Well sir, doesn't it say in the last sentence,
7 "...to obtain instructions on using the large
8 shredder or to set up procedures for your department
9 to destroy sensitive data....," and then he references
10 the Kentucky Document Shredding company; doesn't he?

11 A. That's correct.

12 Q. Sir, isn't it true that at approximately the
13 same time it was of such concern to B&W and the
14 B.A.T. companies about documents falling into the
15 hands of plaintiffs' attorneys that lawyers from the
16 two companies met to discuss the B&W situation?

17 MR. SCHNEIDER: Object to the form.

18 A. I recall you referencing this yesterday, but I
19 have no -- no knowledge about those -- those events.

20 (Plaintiffs' Exhibit 85 was marked
21 for identification.)

22 BY MS. WIVELL:

23 Q. Sir, showing you what's been marked as
24 Plaintiffs' Exhibit 85, it is a memo dated May 20th,
25 1985 to the communications group from R. Binns;

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1 correct?

2 A. That's correct.

3 Q. This is a BAT Co company document, Bates number

4 101427446; right?

5 A. That's correct.

6 Q. And it refers to the facts -- I'm sorry.

7 The subject is "Circulation of R&D Information

8 from Southampton;" right?

9 A. Yes, it is.

10 Q. And it refers to the fact that Richard Baker

11 from Windsor House and Anne Johnson from Millbank

12 will meet in Southampton on the 30 -- 30th and 31st

13 of May for discussions; correct?

14 A. Yes, it does.

15 Q. And the discussions concerned the circulation of

16 documents from G.R. & D.C., particularly in relation

17 to the B&W situation; right?

18 A. That's correct.

19 Q. Now G.R. & D.C. is what, sir?

20 A. I believe it's the research department in

21 Southampton.

22 Q. And did you understand that the B&W situation

23 which is referred to here is the situation of concern

24 that documents would fall into the hands of

25 plaintiffs' lawyers which might be hurtful to B&W in

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1 product-liability cases in the United States?

2 A. As I said before, I think my understanding about
3 the -- the circumstances in the mid-1980s was that
4 there was concern in Brown & Williamson and in BAT Co
5 that scientists in BAT Co, while writing reports on
6 their research, may have used loose language or
7 language that was likely to be misinterpreted
8 inappropriately, and steps were taken to educate, I
9 believe, scientists and to review their -- their
10 documents before they -- they were sent out in the
11 normal course of business, and -- and that it is my
12 understanding that these events, as -- as outlined in
13 this memo, may have been associated with -- with
14 that -- that sort of general environment.

15 Q. And just so we're clear here, the -- the quote,
16 unquote, loose language was the statement by various
17 BAT Co researchers that they believe cigarette
18 smoking caused cancer; isn't that true, sir?

19 MR. SCHNEIDER: Objection to the form.

20 A. I don't know.

21 Q. Well isn't it true that by this time BAT Co
22 had -- I'm sorry, strike that.

23 Isn't it true that by this time various
24 scientists at BAT Co had come to the conclusion that
25 there were constituents in cigarette smoke which were

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1 carcinogenic?

2 MR. SCHNEIDER: Objection to the form,
3 outside the scope, meaning he is not designated to
4 discuss this topic.

5 A. I don't know what conclusions have been reached
6 by research scientists within the BAT Group over the
7 years. I'm not familiar with that -- that topic
8 area.

9 Q. Sir, at the bottom of Exhibit 85 there is a
10 handwritten note, and I have difficulty making it out
11 but I do read, "I've telephoned Carol Lincoln and I
12 told her she must send us a written request to
13 access," and then I can't read what's written there.
14 Can you read it?

15 MR. SCHNEIDER: Object to the form.

16 A. I can read part of it.

17 Q. What -- what do you believe that note says at
18 the bottom?

19 A. Well I think you're correct, I -- I believe it
20 says that -- that "...she must send us a written
21 request to access the cyber - she will do so ASAP."

22 Q. What is the cyber?

23 A. I don't know what the cyber is. It may be --

24 I've not prepared myself to -- to respond to
25 that. It may be that it's reference to the computer

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1 system that stored research at BAT Co at the time.

2 Q. And Carol --

3 A. I don't know that for certain.

4 Q. And Carol Lincoln is the R&D librarian at B&W;
5 correct?

6 A. That's correct.

7 Q. All right. Sir, isn't it also a fact that at or
8 about this time BAT Co and B&W personnel decided to
9 try and protect reports that B&W received from BAT Co
10 by sending copies of them to an American lawyer by
11 the name of Ernie Pepples?

12 MR. SCHNEIDER: Objection to the form.

13 A. I don't believe that's the case. My
14 understanding is that the lawyer that reports were
15 sent to for a short period of time in 1985 was Mr.
16 Maddox.

17 (Plaintiffs' Exhibit 86 was marked
18 for identification.)

19 BY MS. WIVELL:

20 Q. Sir, showing you what's been marked as
21 Plaintiffs' Exhibit 86, it is a BAT Co company
22 document marked "CONFIDENTIAL," Bates numbered
23 109879155, concerning "Notes of Meeting -- Notes on
24 Meeting held at GR&DC, July 17th, 1985;" correct?

25 MR. SCHNEIDER: Objection to the form.

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1 I've not seen this document. This is not
2 designated. I want a moment to take a look at it.

3 MS. WIVELL: Have you had a chance to read
4 the document, Mr. Lowther?

5 MR. SCHNEIDER: I object to the form. And
6 I would ask you, Ms. Wivell, to tell me what is the
7 basis for your claim that you can use this as
8 impeachment?

9 MS. WIVELL: Impeachment. He just said
10 that he did not believe -- well I --

11 He just said he did not believe that documents
12 were forwarded to Pepples.

13 Q. Sir, directing your attention to point four of
14 this document, does it not say on the specific matter
15 of circulation of reports to the United States,
16 "...copies to be sent to Mr. E. Pepples?"

17 MR. SCHNEIDER: Objection to the form. I
18 don't think it's an appropriate use of a
19 non-designated document. You've not been designated
20 to discuss this topic.

21 You can respond.

22 A. This document references the fact that
23 scientific reports would be -- if they were to be
24 sent to the U.S.A., copies would be sent to Mr. --
25 Mr. Pepples, yes.

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1 Q. Sir, also this document discusses the inability
2 to define what is contentious from non-contentious;
3 create -- correct?

4 MR. SCHNEIDER: Object, object to the form.

5 A. I --

6 This document does say that documents could not
7 be usefully classified into contentious/non-
8 contentious on the basis of their categorization,
9 yes.

10 Q. And we had previously seen some documents which
11 directed BAT Co personnel to make a designation about
12 whether something contained contentious or
13 non-contentious material; correct?

14 A. And while I have not prepared myself to deal
15 with what was -- what BAT Co was thinking at this
16 time, it is my understanding that procedures were
17 undertaken for senior scientists to review written
18 reports prior to their release in -- in BAT Co, and
19 that some of the -- the documents you have provided
20 in this case indicate that that was the procedure.
21 That was a review by senior scientists which I take
22 to have been an attempt to prevent loosely-written
23 documents which could be misconstrued or deliberately
24 misinterpreted by outsiders, and that what is said in
25 this particular document is that -- this is

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1 referencing those procedures and it's simply
2 indicating that some reports which would be sent to
3 the U.S.A. would also go to Mr. Pepples, who is a --
4 an attorney -- who -- who was an attorney for Brown &
5 Williamson at the time.

6 MS. WIVELL: Move to strike as
7 non-responsive.

8 Q. Sir, my question was simply: We've seen
9 documents in this deposition already that referred to
10 the designation of documents as contentious and
11 non-contentious; correct?

12 A. That's correct.

13 MS. WIVELL: I need to take a break.

14 THE REPORTER: Off the record, please.

15 (Recess taken.)

16 BY MS. WIVELL:

17 Q. Sir, isn't it true that Brown & Williamson's
18 position in the mid-'80s was that it should be
19 isolated from any research which might be regarded in
20 a U.S. context as at all contentious?

21 MR. SCHNEIDER: Objection to the form.

22 A. That's not my understanding of Brown &
23 Williamson's general position.

24 Q. And isn't it true that Brown & Williamson tried
25 to find alternative means by which it could obtain

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1 information from BAT Co scientists without that
2 information knowingly being able to be traced to
3 Brown & Williamson?

4 A. If you're referring to a period of time in 1985
5 when some BAT Group research reports which would have
6 been routed to Brown & Williamson and were not in
7 fact sent directly to Brown & Williamson but were
8 sent to an attorney for the provision of legal
9 advice, then that -- that is in fact a circumstance
10 and facts that -- that have been included in our
11 interrogatory response.

12 Q. And -- and sir, isn't it true that reports were
13 sent to Mr. Maddox to try and ensure that no one can
14 prove that the information was known to Brown &
15 Williamson?

16 MR. SCHNEIDER: Ms. Wivell, you appear to
17 be asking questions based upon a BAT Co document that
18 we discussed earlier that is designated by a certain
19 number which we'll talk about in a moment. If your
20 questions are not so based on -- on the document, I
21 want to have the opportunity to have you ask those
22 questions. But if you're reading from or taking
23 provisions from a BAT Co document we discussed
24 earlier, we need to address that at this time.

25 Q. Well sir, my question is: Isn't it true that

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1 reports were sent to Mr. Maddox to try and ensure
2 that no one could prove that the information was
3 known to Brown & Williamson?

4 MR. SCHNEIDER: Objection to the form.

5 A. My -- my testimony today is -- is the knowledge
6 of the company relative to the facts contained in the
7 interrogatory response relative to document retention
8 and destruction, and I have not and cannot testify as
9 to what intentions and reservations people in general
10 had in -- in BAT Co at that time. I've not prepared
11 myself for that.

12 Q. No. I'm talking about what intentions Brown &
13 Williamson had, sir, and isn't it true that you
14 testified earlier that reports -- that Brown &
15 Williamson's name was taken off reports and those
16 reports were sent to Mr. Maddox in order that, I
17 think you claimed, he could provide legal advice to
18 some scientists in -- in England?

19 MR. SCHNEIDER: Object to the form.

20 Q. Wasn't that your testimony before?

21 MR. SCHNEIDER: Object to the form.

22 A. It is my understanding that -- that that's
23 correct.

24 Q. And isn't it true, sir, that contrary to your
25 testimony, Brown & Williamson's position was that it

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1 tried to isolate itself from research work which
2 could be regarded in a U.S. context as contentious or
3 perhaps dangerous in product-liability lawsuits?

4 MR. SCHNEIDER: Objection to the form,
5 asked and answered.

6 A. Could you repeat the question, please.

7 Q. Certainly.

8 Isn't it true that, contrary to your testimony,
9 Brown & Williamson's position was that it tried to
10 isolate itself from research work which could be
11 regarded in a U.S. court as contentious or damaging?

12 MR. SCHNEIDER: Object to the form.

13 A. I don't believe so.

14 Q. Isn't it true -- I'm -- I'm going to try and
15 remedy counsel's objection.

16 Isn't it true that, contrary to your testimony,
17 Brown & Williamson's position was that it tried to
18 isolate itself from research work which could be
19 regarded as contentious?

20 MR. SCHNEIDER: Objection to the form,
21 asked and answered.

22 A. It is my understanding that steps were taken in
23 19 -- in the 1980s to --

24 Q. (Coughing) Pardon me.

25 A. -- to review scientific reports before they were

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1 issued, and that these reviews were undertaken by
2 scientists in -- in BAT Co, and that other steps were
3 taken to educate people in how they should
4 communicate the results of their scientific research
5 in ways that could not be inappropriately or
6 unfortunately interpreted by -- by other people. And
7 yes, facts like that have been disclosed in this
8 interrogatory response.

9 Q. Sir, isn't it true that it was Brown &
10 Williamson's position in the mid-'80s, after it had
11 been sued in several personal-injury cases involving
12 smoking-and-health-related issues, that any research
13 which plaintiffs could show it knew about relating to
14 smoking and health might lead to discoveries which
15 would be damaging in court?

16 MR. SCHNEIDER: Object to the form.

17 A. I'm sorry, that was a -- a long question. Could
18 you repeat it?

19 Q. Certainly.

20 Isn't it true that it was Brown & Williamson's
21 position in the mid-1980s, after it had been sued in
22 several personal-injury cases involving
23 smoking-and-health-related issues, that any research
24 which plaintiffs can show it knew about relating to
25 smoking and health might lead to discoveries which

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1 could be damaging in court?

2 MR. SCHNEIDER: Object to the form.

3 A. I'm not sure I understand what you mean by Brown
4 & Williamson's position in that regard. I don't know
5 what Brown & Williamson's position was at that time.

6 Q. All right. Why don't you get out Exhibit 79.

7 MS. TURLAND: Ms. Wivell.

8 MS. WIVELL: Yes.

9 MS. TURLAND: Is that the document you
10 tried to use earlier this morning?

11 MS. WIVELL: Yes.

12 MS. TURLAND: I'm going to object as BAT Co
13 and B.A.T. Industries' counsel to you using the
14 document at this time.

15 MS. WIVELL: On what basis?

16 MS. TURLAND: On the basis that I believe
17 this document is privileged and was authored by a
18 lawyer.

19 We did not request this document back, as far as
20 I can tell right now; however, I believe we did
21 request back an identical document to this which was
22 inadvertently produced to you. We requested that
23 back in a letter to Robins Kaplan dated January 20th,
24 1997. I'm having both that letter as well as the
25 letter from your office of 1/29 faxed to me here.

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1 And I would ask that you -- you not use this document
2 right now, that you return it. And I would claim
3 privilege over it, and that Mr. Schneider direct his
4 witness not to answer any questions about this
5 document.

6 MS. WIVELL: I would like to know your
7 good-faith basis for your belief that this document
8 is authored by a lawyer.

9 MS. TURLAND: I've spoken to people at
10 Simpson Thacher and they believe it's written by a
11 lawyer. I have spoken with Diedre Fox, who believes
12 this document as well as the document requested back
13 in January was written by a lawyer.

14 MS. WIVELL: All right. Just so we're
15 clear here, a claim of privilege was not asserted
16 with regard to the document Bates numbered 301122650
17 through 654 prior to this morning; correct?

18 MS. TURLAND: As far as I know it was not.

19 MS. WIVELL: All right. And just so --

20 MS. TURLAND: But it was -- I'm sorry.

21 MS. WIVELL: Just so I understand here, you
22 have not spoken to any anyone at BAT Co who has given
23 you information which leads you to believe that this
24 was written by a lawyer.

25 MS. TURLAND: I personally have not spoken

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1 to anyone at BAT Co. I have had numerous calls and
2 conversations with people in our New York office. I
3 have asked them to do as much due diligence on this
4 document as they can at this time, and they have done
5 so. I've spoken with Diedre Fox, who has reviewed
6 similar documents. I've spoken with Alexis Cole of
7 our office, who has reviewed similar documents. And
8 they're speaking with other people at our office to
9 determine, and if necessary I can find out further
10 information from London.

11 MS. WIVELL: Well first of all, Diedre Fox
12 does not represent BAT Co; does she?

13 MS. TURLAND: I understand that. No, she
14 does not.

15 MS. WIVELL: And to your knowledge does she
16 have any personal information --

17 Maybe I should ask Diedre. Do you have any
18 personal information of your own knowledge,
19 first-hand, that this document was written by a
20 lawyer?

21 MS. FOX: This document was written --
22 written by a lawyer. That is the information that I
23 have.

24 MS. WIVELL: Well where did you -- I'm
25 sorry. That's a broad assertion without any factual

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1 basis. I'm trying to understand the factual basis
2 for the assertion that you have made that this
3 document was written by a lawyer.

4 MS. FOX: Based on interviews that have
5 been conducted with witnesses, based on review of
6 this document and similar documents, this document
7 has been written by a lawyer.

8 MS. WIVELL: Based on review of -- of what
9 interviews?

10 MS. FOX: Based on review of interviews
11 that have been conducted of BAT Co personnel, this
12 document has been -- has -- was written by a lawyer.
13 It is similar to other documents that were written by
14 a lawyer for which a privilege claim was made, and it
15 is among those documents.

16 MS. TURLAND: And may I just add something
17 here? We believe it was written by a lawyer, and
18 it's similar to another document which was returned
19 by your office after we made a privilege claim on
20 this document.

21 MS. WIVELL: "It is similar to," is that
22 what you said?

23 MS. TURLAND: I believe it's part of the
24 same grouping of documents or is related. That's why
25 we believe this was also written by a lawyer.

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1 MS. WIVELL: And who was that document
2 written by?

3 MS. TURLAND: It was co-authored by Anne
4 Johnson and N. B. Cannar, both of whom are lawyers.

5 MS. WIVELL: Now your -- the information
6 you just gave us about Anne Johnson and Cannar was
7 with regard to another document, not --

8 MS. TURLAND: With regard to another
9 document.

10 MS. WIVELL: -- not this document which
11 we've marked as Exhibit 79.

12 MS. TURLAND: Not this exact document, but
13 which would be possibly related to this document.

14 MS. WIVELL: All right. Well let me --

15 MS. TURLAND: That's the best knowledge I
16 have available to me at this time.

17 MS. WIVELL: All right. Well let me ask
18 you this: This particular document refers to a
19 meeting of the tobacco strategy review team;
20 correct?

21 MS. TURLAND: Yes.

22 MS. WIVELL: And who is on the tobacco
23 strategy review team?

24 MS. TURLAND: At this point in time I can't
25 tell you each member. The tobacco strategy review

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1 team had various members throughout its existence. I
2 can find out for you, possibly from New York today,
3 who was on it and at what period of time. I would
4 have to determine that. In 1986 it's possible that
5 there was a lawyer on the committee, I do not know
6 that for sure.

7 MR. SCHNEIDER: Ms. Wivell, this is Mr.
8 Schneider. The procedures in the case management
9 order allow for the parties to identify documents
10 that are privileged that have been inadvertently
11 produced, at which time the counsel who has received
12 that information is to return the document, or
13 otherwise there is a challenge to call -- there is --

14 There are procedures outlined in the case
15 management order. At the present time BAT Co has
16 identified the document as privileged. It seems to
17 me that the document ought to be taken out of
18 consideration at the present time for further
19 proceeding under the case management order.

20 MS. WIVELL: Well actually I am doing
21 exactly what the case management order says, I
22 believe, which is I am able to ask questions of the
23 witness -- or in this case counsel -- to establish
24 the issues regarding privilege, and I'm going to do
25 that.

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1 As to returning the document, this document has
2 my work product on it. I am willing to put it in an
3 envelope and take appropriate measures with regard to
4 it. I will not return it to you because it has my
5 work product on it. However, I -- I do intend to ask
6 questions with regard to this document. And I would
7 like to know if there were any --

8 If this document was copied to any lawyers, it
9 does not so show on its face. I would like to know
10 who all received this document. It does not show
11 that on its face. I would like to know who is on the
12 tobacco strategy review team. Can -- can you give me
13 any of that information right now?

14 MS. TURLAND: Not right now off the top of
15 my head.

16 MS. FOX: I believe the author of this
17 document is Richard G. Baker, who is an attorney for
18 B.A.T. Industries. As to the particular membership
19 of the TSRT, I cannot tell you the particular
20 membership of the TSRT at this time or who the
21 particular people were.

22 This is a document authored by a lawyer
23 providing legal advice.

24 MS. WIVELL: Well actually I don't think it
25 provides any legal advice. Could you point out where

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1 it provides legal advice?

2 MS. TURLAND: It does. I can point out one
3 portion. If you look at Bates 301122653, the second
4 full paragraph which is under section b), "Smoking
5 and Health Research:

6 "On the general smoking and health issue
7 BATCo's" --

8 MR. SCHNEIDER: I think it's sufficient --
9 I think it's sufficient to identify, Ms. Turland,
10 just that it --

11 MS. TURLAND: No, Ms. Wivell --

12 MR. SCHNEIDER: -- contains advice. You
13 don't need to read it on the record.

14 MS. WIVELL: Is there any other part of
15 this document that you believe contains legal
16 advice?

17 MS. FOX: I believe this entire document is
18 written in the context of providing legal advice and
19 the entire document is privileged.

20 MS. TURLAND: In addition --

21 MS. FOX: Again, it is written by Richard
22 G. Baker, who is an attorney for B.A.T. Industries.

23 MS. TURLAND: In addition, I think there
24 are parts in here for --

25 Yeah, I would agree.

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1 MS. WIVELL: All right. Well we would take
2 the position that this is clearly business advice, if
3 at all, and that the facts about the positions of the
4 various companies are not privileged nor are they
5 work product in any way. And that this document,
6 while -- and I'm not conceding that it does contain
7 in subpart b) under "Smoking and Health Research" a
8 legal advice to a client -- that the other portions
9 of this document regarding the positions of Brown &
10 Williamson concerning its attempts to insulate itself
11 from smoking-and-health research because of
12 product-liability concerns are not legal advice but
13 are factual statements of Brown & Williamson's
14 position, directly contrary to the testimony of this
15 witness earlier that -- that things were routed to a
16 lawyer in order that he provide legal advice to some
17 scientists in -- in England, that it clearly is
18 contrary to his position in that it shows Brown &
19 Williamson's attempts to isolate itself.

20 MS. FOX: Ms. Wivell, this document is not
21 written by Brown & Williamson, it is written by
22 Richard G. Baker, who is counsel to B.A.T.
23 Industries. It is not a statement by Brown &
24 Williamson. In addition to which it is -- it is a
25 statement -- impression of a lawyer for B.A.T.

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1 Industries, attorney impression of a lawyer for
2 B.A.T. Industries, and in that regard also contains
3 attorney mental impressions.

4 MS. WIVELL: I would point out that it
5 states "Brown & Williamson's position" beginning at
6 the top of page two of the document.

7 MR. SCHNEIDER: For the record, Ms. Wivell,
8 I disagree with the statements that you've made.
9 Among other things, this is not a document that you
10 designated for this deposition. Mr. Lowther has not
11 been designated to testify about this subject. He's
12 not been designated to testify about B&W's position.
13 He's been designated to talk about whether there are
14 documents in existence in B&W's files. That is the
15 issue that the interrogatory addresses. This -- this
16 deposition is not for the purpose of discussing all
17 of the discussions that have been had at the company
18 on various subjects over various times. Mr. Lowther
19 cannot speak for the company on those issues. He's
20 not been designated on those issues.

21 This document has been identified as an
22 inadvertently-produced privileged document. Under
23 the case management order the document should be
24 returned. If you don't want to return it, it should
25 be sealed, as you have indicated it will be, and we

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1 should move on.

2 MS. WIVELL: All right. For the record,
3 this document was used only because the witness gave
4 the testimony yesterday that R&D -- that Brown &
5 Williamson's name was taken off of R&D reports and
6 R&D reports were sent to an attorney by the name of
7 Maddox in order that he provide legal advice to
8 scientific members of BAT Co's group in Great
9 Britain, when indeed this fax -- this document
10 directory -- directly contradicts and impeaches that
11 testimony.

12 MR. SCHNEIDER: We disagree with that
13 statement. And I would advise you that Mr. Lowther
14 has testified as to the documents being sent to Mr.
15 Maddox with respect -- for the purposes of seeking
16 legal advice. With respect to copying on the
17 documents, not copying on the documents, he is not
18 designated to discuss that topic. He does not speak
19 for the company on that topic. He has been
20 designated to speak about whether we can or cannot
21 locate documents. That is the sole topic upon which
22 he's been designated.

23 Your summary of his testimony is incorrect.
24 Your use of the document is improper.

25 MS. TURLAND: I would just like to say one

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1 more thing. I believe this document is privileged,
2 the entire document is privileged, not portions of
3 it, and that's the claim that we asserted over the
4 document that was produced and requested --
5 inadvertently produced to you and requested back on
6 January 20th.

7 MS. WIVELL: Just so we're clear here, that
8 document, the document that is the subject of our
9 discussion today, was not requested to be returned,
10 and today is the first time that we have heard a
11 privilege claim asserted with respect to it;
12 correct?

13 MS. TURLAND: That is correct.

14 I just want to state that for both documents
15 we're making the same claim because we believe the
16 documents are identical.

17 Thank you for agreeing to seal the document.

18 MS. WIVELL: I will seal the document.

19 Why don't we take a lunch break.

20 THE REPORTER: Off the record, please.

21 (Luncheon recess taken at 12:09 o'clock
22 p.m.)

23

24

25

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1 AFTERNOON SESSION

2 (Deposition reconvened at 1:37 o'clock
3 p.m.)

4 BY MS. WIVELL:

5 Q. Sir, isn't it true that in interrogatory answers
6 that are Exhibit 26 to this deposition, Brown &
7 Williamson claimed that it did not have a policy to
8 avoid receiving reports from BAT Co companies for the
9 purpose of -- of evading discovery?

10 A. I don't believe that language such as you used
11 is incorporated in -- into this interrogatory
12 response.

13 Q. So if it's there, you just are unaware of it; is
14 that correct?

15 A. I believe I'm familiar with the interrogatory
16 response, and I'm not aware of any language such as
17 you have just used included within it.

18 Q. All right. Let me ask you this, sir: Isn't it
19 true that Brown & Williamson lawyers and members of
20 the R&D department during the period mid-1985 and on
21 attempted to limit access to R&D reports obtained
22 from B.A.T. companies by claiming that they were
23 privileged?

24 MR. SCHNEIDER: Object to the form, outside
25 the scope.

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1 Mr. Lowther is not designated to discuss that
2 topic. That's not a topic of the interrogatory
3 response. He can give you any personal knowledge, if
4 he has any.

5 A. Could you repeat the question, please.

6 Q. Certainly, sir.

7 Isn't it true that Brown & Williamson lawyers
8 and members of the R&D department during the period
9 beginning approximately mid-1985 and on attempted to
10 limit access to R&D reports obtained from B.A.T.
11 companies by claiming they were privileged?

12 MR. SCHNEIDER: Objection to the form, same
13 objection.

14 A. I don't know about that.

15 Q. All right, sir. (Coughing) Pardon me.

16 Isn't it true that a discussion took place about
17 a possible system that would -- could be developed
18 which would exempt reports that were received from
19 BAT Co by claiming them to be privileged?

20 MR. SCHNEIDER: Object to the form, outside
21 the scope.

22 Mr. Lowther has not been designated to discuss
23 this topic.

24 A. I don't know about that.

25 Q. Well sir, isn't it true that at page 16 of

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1 Exhibit 26, it says, "The foregoing reports do not
2 cover any particular topic or time frame, nor reflect
3 any policy to avoid receiving these reports for the
4 purpose of evading discovery?"

5 A. It is my understanding --

6 MR. SCHNEIDER: Page 16 -- Exhibit 26, page
7 16.

8 Q. Could you turn to page 16 and see if you find
9 that claim made in the interrogatory answers.

10 A. It does -- it does indeed say that.

11 Q. All right. Now let me ask you, then: Isn't it
12 true that Brown & Williamson, through its attorney
13 Kendrick Wells, spoke with Mr. Esterle of the R&D
14 department and memorialized through a document a
15 system where it was possible -- or it was thought to
16 be possible that R&D documents could be sent to the
17 legal department and therefore claimed privileged?

18 MR. SCHNEIDER: Object to the form, outside
19 the scope. Further object that you seem to be
20 relying on a stolen, privileged document. The
21 question is improper. Mr. Lowther has no knowledge
22 of this subject. He's not designated to speak on
23 this topic.

24 MS. WIVELL: Well for the record, Mr.
25 Schneider, I'm referring to my notes, just so the

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1 record is clear.

2 Do you have my question in mind, sir?

3 THE WITNESS: I do not.

4 Q. Isn't it true that Brown & Williamson, through
5 its attorney Kendrick Wells, spoke with Mr. Esterle
6 of the R&D department and created a document where
7 they memorialized their conversations and referred to
8 setting up a possible system where the legal
9 department would get R&D documents to exempt those
10 reports by claiming them privileged?

11 MR. SCHNEIDER: Objection, same objection.

12 A. It is --

13 It's my understanding that the facts of -- of
14 the matter are that for the period from 1980 to 1993,
15 more -- of more than 700 reports issued by B.A.T.
16 research companies -- BAT Co, distributed to B&W,
17 Brown & Williamson has found all but 10 in its
18 files. It's my understanding that all documents of
19 this nature were reviewed on a document-by-document
20 basis, and it is my understanding if they were
21 considered responsive they would have been produced
22 in this case, and not privileged. If they were
23 claimed to be privileged, then they will be listed on
24 a log and plaintiffs will -- will be aware of that.

25 MS. WIVELL: Move to strike as

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1 non-responsive.

2 Q. Sir, my question -- and maybe you just don't
3 know the answer to this question, and if so, you can
4 tell me. But my question is: Isn't it true that
5 Brown & Williamson's lawyer Kendrick Wells spoke with
6 Mr. Esterle of the R&D department about creating a
7 system where documents would be exempt from being
8 produced in product-liability litigation, documents
9 that were received from BAT Co, because they would be
10 sent in such a way that a privilege claim could be
11 made for them?

12 MR. SCHNEIDER: Object to the form. Again,
13 this question is outside the scope. Mr. Lowther has
14 no knowledge on this subject. Mr. Lowther is not
15 designated to speak on this subject. The subject is
16 not covered by the interrogatory response.

17 MS. WIVELL: Well Mr. Schneider, it is
18 covered by the interrogatory response. A bold-face
19 assertion was made in those interrogatories that
20 there was no such pattern, and I have the right to
21 cross-examine Brown & Williamson on this subject
22 which is covered in the interrogatory answers. And I
23 don't appreciate your speaking objections to the
24 contrary which are coaching this witness.

25 MR. SCHNEIDER: I object to your

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1 statement. I don't agree with it.

2 Object to the form and repeat my objection,
3 incorporate it herein.

4 Q. Let me repeat my question, sir. Isn't it true
5 that Brown & Williamson's attorney, Kendrick Wells,
6 spoke with Mr. Esterle of the R&D department about
7 creating a system where documents would be sent from
8 BAT Co so that it could be claimed that these
9 documents were privileged?

10 MR. SCHNEIDER: Object to the form. Same
11 objection.

12 A. I don't know about that.

13 Q. So that was something that was not shared with
14 you by Mr. Wells during your deposition prep for your
15 deposition here today; correct?

16 MR. SCHNEIDER: Object to the form.

17 A. My preparation for the deposition today has been
18 to understand the items included in this
19 interrogatory response and did not include
20 understanding all facts of people interviewed during
21 the due diligence review, and I'm not aware of -- of
22 any reference to items that you have just referenced.

23 Q. Well sir, the interrogatory response makes a
24 flat assertion that there was no policy to avoid
25 receiving reports for the purpose of evading

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1 discovery. Did you do anything to try and determine
2 whether or not that statement was accurate?

3 MR. SCHNEIDER: Object to the form,
4 misleading.

5 A. It is -- it is my testimony that that statement
6 is consistent with my understanding of Brown &
7 Williamson's attempt over the years to retain
8 documents. It's retained huge numbers of documents.
9 It has undertaken exhaustive efforts during the
10 course of reviewing what documents it should retain
11 and what documents it may not retain to make sure
12 that it does not dispose of documents that are
13 required for legal purposes. To the best of my
14 knowledge it has always made good efforts to retain
15 smoking-and-health documents, and it has produced
16 large numbers of them in this case. I have no
17 evidence that suggests that at any time Brown &
18 Williamson has a policy to do anything to evade
19 discovery.

20 MS. WIVELL: Move to strike as
21 non-responsive.

22 Q. Sir, my question is simply this: There is an
23 assertion here that there was not a policy to avoid
24 receiving reports for the purpose of evading
25 discovery. It's part of the interrogatory answer

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1 that you're here to talk about. And I want to know:

2 Did you personally do anything to try and determine

3 whether or not that statement was accurate?

4 MR. SCHNEIDER: Object to the form,

5 misleading.

6 A. Could you repeat the question, please.

7 Q. Certainly.

8 There is an assertion here that there was not a

9 policy to avoid receiving reports for the purpose of

10 evading discovery. It's part of the interrogatory

11 answer that you have been designated to talk about.

12 And I want to know: Did you do anything to try and

13 determine whether or not that statement was

14 accurate?

15 MR. SCHNEIDER: Object to the form, same

16 objection as earlier.

17 A. I did not reperform the due diligence review

18 that was undertaken by outside counsel. And the

19 statement that you are referencing here is in the

20 context of reporting on large numbers of reports that

21 were issued by BAT Co and are in Brown & Williamson's

22 files. We have evidence that indicates that of more

23 than 700 reports that were issued, we have all but

24 10. I think that indicates that by and large Brown &

25 Williamson did not undertake wholesale attempts not

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1 to receive documents. And even if it had done so,
2 there are reasons why Brown & Williamson would not
3 receive reports which are not relevant, which don't
4 have facts which are of use to Brown & Williamson or
5 really are of no business -- or potentially
6 misinterpretable. So I do not believe that there has
7 ever been a policy to avoid receiving reports for the
8 purpose of evading discovery.

9 MS. WIVELL: Sir, move to strike as
10 non-responsive.

11 Q. My question was simply this: There is a
12 statement here that there was no policy to avoid
13 receiving reports for the purpose of evading
14 discovery, and the simple fact is you did nothing to
15 determine the accuracy of that yourself in preparing
16 for that deposition -- in this deposition; isn't that
17 true?

18 MR. SCHNEIDER: Object to the form.

19 A. It's my understanding that I have -- I have
20 reviewed and ascertained facts that are included in
21 this interrogatory response, and those facts are
22 consistent with the statement that Brown & Williamson
23 does not have a policy to avoid receiving reports for
24 the purpose of evading discovery.

25 Q. Sir, isn't it a fact that if Brown & Williamson

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1 had that policy, you just didn't know it one way or
2 the other; did you?

3 MR. SCHNEIDER: Object to the form, outside
4 the scope. Not designated to discuss this topic.

5 MS. WIVELL: Oh, he is designated to
6 discuss this topic, sir. It is a quote from the
7 dep -- or from the interrogatory answers. And it's
8 just really improper for you to suggest that he's --
9 it's outside the scope.

10 MR. SCHNEIDER: It is not --
11 Your question is not a quote from the
12 interrogatory response. The sentence refers to
13 specific lists of reports and says that those reports
14 do not reflect any policy. This gentleman is not
15 designated to discuss what the policies of B&W were
16 or were not, he's designated to answer questions
17 concerning whether or not there are instances
18 reported in this interrogatory response, and that is
19 what he's here to testify about.

20 MS. WIVELL: Sir, your interpretation of
21 what this deposition is or not -- is not about is
22 inaccurate. This deposition was noted to discuss the
23 interrogatory answers which were filed February 11th,
24 1997.

25 Q. I am quoting and I will quote again from the

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1 interrogatory answer. Sir, it says here -- refers to
2 "The foregoing reports do not cover any particular
3 topic or time frame, nor reflect any policy to avoid
4 receiving these reports for the purpose of evading
5 discovery." Have I read that correctly, sir?

6 A. Yes, you have.

7 Q. And you did nothing personally in preparing for
8 this deposition to determine the accuracy or
9 inaccuracy of that particular claim; did you, sir?

10 MR. SCHNEIDER: Objection to the form.

11 A. I did not personally undertake the review of
12 these reports, that's correct.

13 Q. And you personally didn't undertake the review
14 of the 77 interviews; did you, sir?

15 A. No, I did not.

16 Q. And you personally did not review the memo
17 Kendrick Wells wrote about his discussions with Mr.
18 Esterle about trying to create a system where reports
19 received from BAT Co could be claimed as privileged;
20 did you, sir?

21 MR. SCHNEIDER: Objection to the form.

22 A. I don't know about that document.

23 Q. And isn't it true that Mr. Wells thought that
24 continued law-department control of BAT Co reports
25 was essential in order to keep them out of the hands

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1 of plaintiffs' lawyers?

2 MR. SCHNEIDER: Object to the form. And to
3 the extent that you are quoting from a privileged,
4 stolen document, I believe the question is improper.
5 We preserve our privilege objection with respect to
6 the use of that document or any use or quotation from
7 it. Mr. Lowther is not designated to discuss the
8 topic.

9 A. I don't know about any thoughts that Mr. Wells
10 may have had over the years.

11 Q. Well do you know that Mr. Wells suggested that
12 Ernie Pepples look at reports that were received from
13 BAT Co and divide them into a sensitive group and
14 a -- and a group that could be sent to the library?

15 MR. SCHNEIDER: Same objection.

16 A. I don't know about that.

17 Q. Do you know if a suggestion by Mr. Wells of
18 making Dr. Sanford an agent of the law department so
19 that the documents he received from BAT Co could be
20 claimed to be privileged?

21 MR. SCHNEIDER: Same objection.

22 A. I don't know about that.

23 Q. Sir, you said that Brown & Williamson has had a
24 policy of complying with discovery requests and
25 producing documents. I'd like to refer to one

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1 particular document that was mentioned in Mr.
2 Kendrick Wells' deposition in Butler, and that is a
3 document concerning a meeting that occurred in
4 Vancouver, British Columbia. Are you familiar with
5 that testimony, sir?

6 A. No, I'm not.

7 (Plaintiffs' Exhibit 87 was marked
8 for identification.)

9 BY MS. WIVELL:

10 Q. Sir, showing you what's been marked as
11 Plaintiffs' Exhibit 87, this is a portion of Mr.
12 Kendrick Wells' deposition taken in the Butler case.

13 MS. WIVELL: Why don't we go off the record
14 while you review it.

15 THE REPORTER: Off the record, please.

16 (Momentary discussion off the record.)

17 MR. SCHNEIDER: I don't want by my silence
18 in going off the record to waive the letter that we
19 gave you this morning, which as a general rule we
20 don't think we should go off the record. But as I
21 said yesterday, I don't think it got to be that big
22 an issue. It hasn't gotten to be that big an issue
23 today.

24 And with having said that, I think we can go off
25 the record and read the document.

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1 THE REPORTER: Off the record, please.

2 (Discussion off the record.)

3 BY MS. WIVELL:

4 Q. Sir, while we were off the record, you had the
5 opportunity to read Exhibit 87; correct?

6 A. Yes, I did.

7 Q. And it refers to some testimony that Mr. Wells
8 gave concerning minutes of a meeting that took place
9 in Vancouver, British Columbia in 1989; right?

10 A. I believe that's correct.

11 Q. And according to Mr. Wells' testimony, Jeff
12 Wigand sent a copy after he had made some notes on
13 it; right?

14 A. That's correct.

15 Q. And he --

16 And Mr. Wigand sent Mr. Wells the copy with the
17 notes on it; right?

18 A. I believe that's right.

19 Q. Sir, under Brown & Williamson's
20 document-retention policy, if someone makes notes on
21 a document, that is considered a new document;
22 correct?

23 A. I believe that's correct.

24 Q. Can you explain why the document with the
25 handwritten notes on it that is referred to in this

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1 testimony has not been produced to the plaintiffs in
2 this case?

3 MR. SCHNEIDER: Object to the form.

4 A. I've not been prepared to -- to review that --
5 that issue. I can't comment on a
6 document-by-document basis. It's my understanding
7 that our interrogatory response deals with the
8 matters of documents which may have been destroyed,
9 only copy, related to smoking and health,
10 advertising, marketing, promotion. I don't know what
11 the content of these minutes in the meeting in
12 Vancouver is, and I can't comment on that, that
13 issue.

14 Q. Well let me show you the copy that does not
15 contain Jeff Wigand's handwritten notes.

16 MR. SCHNEIDER: Objection to the form.

17 (Plaintiffs' Exhibit 88 was marked
18 for identification.)

19 BY MS. WIVELL:

20 Q. Sir, showing you what's been marked as
21 Plaintiffs' Exhibit 88, why don't you look through it
22 and tell me if there are any handwritten notes on it.

23 A. I don't believe there are.

24 Q. And for the record, Exhibit 88 is a document
25 from Brown & Williamson's files entitled "Research

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1 Policy Group Meeting, 18-22 September 1989, Pan
2 Pacific Hotel, Vancouver, Canada;" correct?
3 A. That's correct.
4 Q. And it's Bates numbered 682810250 through 261;
5 correct?
6 A. That's correct.
7 Q. Now if you look down to approximately the middle
8 of the first page, it says here, "Delegates agreed
9 that the aims of the meeting would be as follows:
10 "To agree priorities for external S&H research."
11 Did I read that correctly?
12 A. Yes, you did.
13 Q. You understand S&H research to mean
14 smoking-and-health research; correct?
15 A. Yes, I do.
16 Q. Then if you look at the second page, it
17 concerns --
18 There is a heading entitled "Smoking and
19 Health;" correct?
20 A. Yes, there is.
21 Q. Goes on to talk about "RET introduced the draft
22 discussion document 'Smoking and Health: Future
23 Strategems for Research;'" correct?
24 A. "Future Strategies for Research," yes.
25 Q. I'm sorry. My copy is a little blurred.

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1 Then it goes on to say, "This was a critical
2 review of the main smoking and health work areas;"
3 right?

4 A. Yes, it does.

5 Q. Now sir, isn't it a fact that Jeffery Wigand
6 thought these doc -- these minutes were inaccurate
7 and corrected and made statements -- I'm sorry, let
8 me begin again.

9 Isn't it true that Jeffery Wigand thought that
10 the minutes which are Exhibit 88 were incorrect?

11 MR. SCHNEIDER: Object to the form.

12 A. I don't know that. I cannot comment on Dr.
13 Wigand's impressions of this -- of these minutes.

14 Q. But we do know from Kendrick Wells' testimony
15 that's included in Exhibit 87 that there was a
16 marked-up copy of these made after the meeting was
17 held; right?

18 A. It's my understanding that Mr. Wells' testimony
19 was that he thought that Mr. Wigand may have made
20 some notes on a copy of them.

21 Q. And then it goes on to say that there -- on the
22 second page of Exhibit 87, quote, "There is a set
23 that I know of in the law department files;" correct?

24 A. That's what it says, yes.

25 Q. All right. So it would be fair to assume that

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1 these marked-up notes would have been produced in the
2 Minnesota litigation; wouldn't it, sir?

3 MR. SCHNEIDER: Object to the form.

4 A. It's my understanding that if this document had
5 been in Brown & Williamson's files and had been
6 reviewed, it probably would have been produced.

7 Q. Can you explain to me why it wasn't?

8 A. I can't comment on a document-by-document basis,
9 no.

10 Q. Well, would it be fair to say that if Brown &
11 Williamson has the document, if it still exists, that
12 it should have been produced to plaintiffs?

13 MR. SCHNEIDER: Object to the form.

14 A. It's my understanding that a copy of the
15 document has been produced to -- to plaintiffs.

16 Q. It's your understanding that a copy of the
17 document with Jeffery Wigand's handwritten comments
18 has been produced to the plaintiffs in this
19 litigation?

20 MR. SCHNEIDER: Object to the form.

21 A. No, I do not know that. I understand that the
22 copy that you've produced as Exhibit 88 was produced
23 to plaintiffs.

24 Q. Yes. But that does not include Jeffery Wigand's
25 handwritten comments; does it, sir?

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1 A. That's correct.

2 Q. And I ask again: Why have Jeffery Wigand's
3 handwritten notes or handwritten corrections to the
4 draft not been produced to plaintiffs?

5 MR. SCHNEIDER: Object to the form.

6 A. It's my understanding that draft documents from
7 time to time are not retained, and that's just a
8 matter of -- of -- of practice in -- in business from
9 time to time, and it may well be that that is what
10 happened to these back in 1989. I don't know the
11 circumstances surrounding this document.

12 Q. Sir, isn't it true that at the time that Exhibit
13 88 was drafted, Brown & Williamson had in place a
14 policy that said that any handwritten comments or
15 additions to a document were in essence a new
16 document?

17 MR. SCHNEIDER: Object to the form.

18 A. It is my understanding that if a document is
19 received and notes are written on the side, then that
20 is a document. If it is a document that is required
21 to be retained, then that would normally be retained.

22 Q. And sir, you would agree that if Jeffery Wigand
23 made handwritten notes on the document which is
24 Exhibit 88, it would be a new document which would
25 have been, at the time it was created, subject to a

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1 legal hold, as you have put.

2 MR. SCHNEIDER: Object to the form.

3 A. That's not necessarily my understanding. My
4 understanding is that documents may be prepared in
5 draft and reviewed during the course of -- of normal
6 business, and that documents prepared like that which
7 are not yet final where there's -- no agreement has
8 yet been reached that such documents fairly present
9 the position or the business of the company, and that
10 such documents like that, draft documents, may not
11 necessarily be retained.

12 I don't know the circumstances in connection
13 with this particular document. I don't know when
14 the -- the -- the notes were prepared and I don't
15 have any knowledge about the circumstances
16 surrounding this.

17 Q. All right. But we do know that at the time Mr.
18 Wells was deposed in the Butler case last year, there
19 was a set of the notes in the law department's files;
20 correct?

21 MR. SCHNEIDER: Object to the form.

22 A. Well my understanding is that plaintiffs have a
23 copy of -- of the minutes of this meeting, if that's
24 what you're referring to, yes.

25 Q. No. I'm talking to the notes that Jeffery

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1 Wigand marked up that Mr. Wells said were in the law
2 department files. Those existed as of last year;
3 didn't they, sir?

4 A. It's not my --

5 MR. SCHNEIDER: Object --

6 A. -- understanding that the notes that Mr. Wells
7 says there's a set in the law department files, I
8 don't know whether those particular ones in the law
9 department files have Mr. -- Dr. Wigand's notes or
10 not.

11 Q. Well --

12 A. I'm not aware of that. I don't think that Mr.
13 Wells' testimony is clear on that point.

14 Q. Well let me ask you this, sir: Are you telling
15 me that Jeff Wigand's notes were destroyed?

16 MR. SCHNEIDER: Object to the form.

17 A. I do not know that.

18 Q. They certainly aren't referred to as a destroyed
19 document in the interrogatory answers which have been
20 marked as Exhibit 26; right?

21 A. That's correct.

22 Q. You would agree that if they exist, they should
23 be produced to plaintiffs; correct?

24 MR. SCHNEIDER: Object to the form.

25 A. It -- it was my testimony that if these

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1 documents existed, then they would have been
2 produced. I don't know whether they are in Brown &
3 Williamson's files. We do not have any information
4 that they're not in Brown & Williamson's files.

5 Q. Well you said they would have been produced if
6 they existed, so from that may we infer that they no
7 longer exist?

8 MR. SCHNEIDER: Object to the form.

9 A. I have no knowledge on, you know, what -- what
10 the status of these -- these notes are.

11 Q. So you just don't have any information on the
12 subject one way or the other; do you?

13 A. I have no knowledge on these specific
14 circumstances here, no.

15 Q. You don't know if they're among the documents
16 that are listed on the five pages of notes from -- of
17 files destroyed from Mr. Wigand's files; do you, sir?

18 A. I don't know that at this time.

19 Q. Do you have that document here today, the five
20 pages of files destroyed from Mr. Wigand's files?

21 A. I do not.

22 Q. Did you ask about it?

23 A. I believe inquiries are under way in that
24 regard.

25 Q. Ah. And inquiries are not finished; is that

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1 what your testimony is?

2 A. That's my belief, yes.

3 Q. Did you discover that the document was indeed
4 pulled out of the Minnesota depository the day after
5 the interrogatories that are the subject of this
6 deposition was filed?

7 MR. SCHNEIDER: Objection to the form.

8 And Ms. Wivell, to avoid confusion, Mr. Lowther
9 does not have the document. I have obtained the
10 document. We are making some additional inquiries
11 and hope to have the inquiries resolved soon so that
12 we can either give you the document today or tomorrow
13 once we have resolved the issue that -- that it can
14 be produced in the case.

15 MS. WIVELL: Well Mr. Lowther -- or Mr.
16 Schneider, I need it now. Do you have it?

17 MR. SCHNEIDER: Yes, I have the document.

18 MS. WIVELL: May I see it?

19 MR. SCHNEIDER: Well you need to wait until
20 I complete my inquiries with respect to it.

21 MS. WIVELL: I'm afraid I can't do that. I
22 would like to see the document now. Is there a
23 particular objection to my having the document?

24 MR. SCHNEIDER: Well let me go -- go back
25 and correct a few things. First, you said yesterday

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1 that you thought this document had been pulled out of
2 the depository. That's incorrect. The document has
3 not been placed into the depository at any time. It
4 is a document that was listed on the 4B index that
5 came along with box 1295. The people at the
6 depository looked into the box, noticed that there
7 were three documents missing, and that's what --
8 those were the ones that appeared on your notation
9 sheet. When they asked for those documents to be --
10 to see why those documents were missing, it was
11 established at that time that the documents were --
12 had been flagged as potentially privileged. We have
13 now --

14 We have obtained the document. We are trying to
15 do a couple of additional inquiries to end that
16 inquiry and determine that we can produce the
17 document.

18 MS. WIVELL: Well sir, I need to know that
19 now. I would like to know whether the document is
20 privileged or it's not privileged.

21 MR. SCHNEIDER: Well let -- let me try to
22 make another call to see if we can't resolve that
23 issue in the next five minutes.

24 MS. WIVELL: All right. Why don't we go
25 off the record so you can do that.

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1 THE REPORTER: Off the record, please.

2 (Recess taken.)

3 (Plaintiffs' Exhibit 89 was marked
4 for identification.)

5 MR. SCHNEIDER: Yes. With respect to
6 Plaintiffs' Exhibit 89 which is marked, document
7 number 68274179 through 83, we have produced this
8 document here today to plaintiffs. It does not have
9 the "PROTECTED BY THE MINNESOTA TOBACCO LITIGATION
10 PROTECTIVE ORDER" on it, but it should be deemed to
11 be a protected document. We will send a copy to the
12 depository.

13 Yesterday Ms. Wivell presented a notation sheet
14 which indicated that there was a reference to this
15 document on the index for box 1295. This document
16 was not in box 1295. When we received the note of
17 the missing pages we went back to the company; this
18 document had been flagged for privilege review. And
19 we have, as you know, a process going on of producing
20 privilege logs, and things that we identified that
21 have been flagged that we determine not to be
22 privileged are part of our de-privileged group. This
23 would be going into one of those boxes. So we
24 produce it here today as a depository document.
25 BY MS. WIVELL:

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1 Q. Sir, do you have Exhibit 89 before you?

2 A. I do.

3 Q. Do you understand it is the document that we
4 have been referring to here that is entitled "Files
5 from JS Wigand destroyed?"

6 A. That's correct.

7 THE REPORTER: Just a moment. Off the
8 record, please.

9 (Discussion off the record.)

10 BY MS. WIVELL:

11 Q. Sir, and amongst those files are listed all of
12 Jeffery Wigand's personal files; correct?

13 A. Well it's my understanding that this is a list
14 of files that were obtained from Dr. Wigand, that's
15 correct.

16 Q. And amongst those files which were destroyed
17 were all of his personal files; correct?

18 MR. SCHNEIDER: Objection to the form.

19 A. I -- I don't know that I can respond as to
20 whether it's a complete list of every file that Mr.
21 Wigand ever had. It's evidently a list of some files
22 that Mr. Wigand at one time had which had been
23 destroyed.

24 Q. (Coughing) Pardon me.

25 And among those, the second item is, quote, "All

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1 personal files;" correct?

2 MR. SCHNEIDER: Objection. Marti, I think
3 that says "personnel."

4 MS. WIVELL: I'm sorry. Let me take that
5 back.

6 Q. Have you had an opportunity to check to see
7 whether all of these documents that are referred to
8 on this exhibit have been produced to plaintiffs?

9 A. It's my understanding that this is a listing of
10 documents which have been destroyed, if they have
11 been destroyed. On the second page and other pages
12 there are indications of files which have been passed
13 on to other people in Brown & Williamson. I've not
14 prepared myself to indicate which of these have been
15 produced and which have not been, but it is my
16 understanding that files of this nature may have been
17 responsive in this case and probably would have been
18 produced if they were within Brown & Williamson's
19 files.

20 Q. Sir, to correct something you said, the files
21 passed on to other Brown & Williamson employees begin
22 at page three of the document; correct?

23 A. I believe that's correct.

24 Q. And there's no way for us to tell whether -- I'm
25 sorry. Let me begin again.

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1 There's no way for us to tell the contents of
2 the various files that were destroyed that are listed
3 on the first two pages of the document; right?

4 A. Well it's my understanding that there's a
5 general description about what those files are.

6 Q. All right. But apart from that there's no way
7 for us to tell what was actually in the files which
8 were destroyed which are listed on the first two
9 pages of this document; right?

10 MR. SCHNEIDER: Object to the form.

11 A. I don't believe we have detailed knowledge of
12 the exact items, no.

13 Q. Who typed this list?

14 A. I don't know who typed this list.

15 Q. All right. Will you find that out and report
16 back to me?

17 A. Yes, I will.

18 Q. Thank you.

19 MR. SCHNEIDER: Ms. Wivell, to streamline,
20 I -- my current knowledge is it was prepared by
21 Martha Thomas.

22 Q. Do you adopt what your counsel just said, that
23 this list was prepared by Martha Thomas?

24 A. I accept that.

25 Q. Sir, do you have anything more to report back

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1 about any of the things that you told us yesterday
2 you didn't know the answer to?

3 MR. SCHNEIDER: Object to the form.

4 A. I can tell you in con -- connection with this
5 list, my understanding is that inquiries were made as
6 part of this due diligence review to establish
7 whether the only document relating to smoking and
8 health or advertising, marketing, promotion may have
9 been destroyed. Inquiry was made of Martha Thomas in
10 this regard, and it is my understanding that Martha
11 Thomas, who had been a -- an employee within R&D for
12 some time and was well aware of Brown & Williamson's
13 retention policy, her understanding of -- of the
14 circumstances surrounding this is that she went
15 through these files and the files that were destroyed
16 were not Brown & Williamson's only copy of a document
17 relating to smoking and health, advertising,
18 marketing and promotion, and in that regard,
19 therefore, no report was made in the interrogatory
20 response relative to this.

21 Q. Sir, have you spoken with Martha Thomas?

22 A. Yes, I have.

23 Q. You personally spoke with her.

24 A. Yes, I have spoken with Martha Thomas.

25 Q. When did you speak with her?

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1 MR. SCHNEIDER: Let me interrupt and make
2 sure we're not correct -- make sure that Mr. Lowther
3 is not making an error. The person whom you spoke to
4 was Ms. Iler.

5 A. To clarify, my response was yes, I've spoken to
6 Martha Thomas. I know Martha Thomas. She works on
7 the same floor as I do. I have not spoken to her in
8 connection with Dr. Wigand's files.

9 Q. All right. So just so we're clear here, the
10 information you gave me earlier about what Martha
11 Thomas understood is information you do not have
12 personal knowledge of, sir; do you?

13 A. That's correct.

14 Q. You have not spoken with Martha Thomas about
15 what was or was not in these files that are listed on
16 this document; correct?

17 A. That's correct.

18 Q. You have not read anyone's interview notes
19 concerning Martha Thomas's interview; right?

20 A. I have not done so. I have, however, spoken
21 with Robyn Iler, who did, I believe, undertake the
22 interview with Martha Thomas.

23 Q. You have not seen Ms. Iler's notes of that
24 interview however; have you?

25 A. I have not.

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1 Q. Do you have any other facts to report back to us
2 about any of the things you didn't -- weren't able to
3 answer yesterday?

4 MR. SCHNEIDER: Object to the form.

5 A. That's a very broad question. I mean if you can
6 indicate to me --

7 Q. All right.

8 A. -- some items that I said I would come back to
9 you on.

10 Q. Were there any individuals interviewed whose
11 names do not appear on the 77 -- the list of 77
12 individuals?

13 A. I believe we have -- we have reviewed several
14 names. We've talked about Mr. Kohnhorst, Mr. -- Dr.
15 Esterle, Mr. Sachs. I'm not aware of any -- any
16 supplemental names.

17 The interrogatory response does indicate that if
18 additional information is gleaned, then supplemental
19 information will be provided.

20 Q. Do you remember the name of the fourth King &
21 Spalding lawyer who conducted the interviews?

22 A. I believe it may be Mary Anne Walser.

23 Q. Have any notes of those interviews been
24 destroyed, sir?

25 A. It's my understanding that Mr. Schneider

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1 yesterday asked that notes -- any notes that were in
2 the possession of King & Spalding be preserved, and I
3 have no further knowledge about that issue.

4 Q. All right. Before Mr. Schneider asked that
5 those notes be preserved, were any of those notes
6 destroyed?

7 A. I have no knowledge about that issue.

8 Q. You just don't know one way or the other.

9 A. I have no reason to believe that any of them
10 were necessarily destroyed.

11 Q. Sir, you just don't know one way or the other;
12 do you?

13 A. I do not know.

14 Q. Would you find that out and report back, please?

15 A. I will do so.

16 Q. Thank you.

17 Sir, are you aware of a subpoena that was served
18 by federal officials on Brown & Williamson in
19 December of 1994 for documents relating to Sales
20 Specialty Markets Division of Brown & Williamson?

21 MR. SCHNEIDER: Objection to the form,
22 outside the scope.

23 A. I have not prepared myself to answer on that
24 topic. I do have an understanding that events like
25 that occurred in 1994.

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1 Q. Were documents destroyed or removed from Brown &
2 Williamson in the fall of 1994 before the subpoena
3 was served by federal officials?

4 MR. SCHNEIDER: Objection to form.

5 A. I'm not aware of -- of circumstances such as you
6 describe.

7 Q. Would it be fair to say you just don't know one
8 way or the other?

9 A. I don't know of any circumstances like that,
10 that's correct.

11 Q. Sir, the last time we met I asked you some
12 questions about American Tobacco Company. Do you
13 recall that?

14 A. Yes, I do.

15 Q. Have you educated yourself at all about the
16 destruction or transfer of American -- any of
17 American's documents?

18 A. I believe at my deposition last time I told you
19 broadly what I understood about the American
20 production. I have not prepared myself to talk about
21 what happened at American in connection with the
22 transfer when American was acquired, so I'm not
23 really prepared to speak to that issue.

24 Q. All right. Well let me just ask you some
25 questions to see if perhaps you know the answer to

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1 them. Was the legal right to any American document
2 transferred to Brown & Williamson but the document
3 left someplace else?

4 A. I have --

5 I don't know about that.

6 Q. Was the legal right to any American doc --
7 American document transferred to someone else at the
8 time Brown & Williamson was merged with American
9 Tobacco?

10 MR. SCHNEIDER: Object to the form.

11 A. I don't know about that.

12 Q. Do you know how, at the time Brown & Williamson
13 was merged with American Tobacco Company, American
14 Tobacco Company documents were defined?

15 A. I have a -- an understanding that at the time of
16 the acquisition, documents were reviewed by outside
17 counsel to collect up documents which may be
18 responsive. I know, too, that following the
19 acquisition, Brown & Williamson employees collected
20 documents and incorporated them into files in Brown &
21 Williamson, and as part of that process decisions
22 were made as to what documents were necessary to keep
23 for retention purposes and which were not, and as
24 part of that the definitions were -- were made.

25 Q. Well as part of that process that you just

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1 described, are you prepared to talk about the
2 decisions that were made as to what documents should
3 be kept and what documents should be discarded?

4 A. Well I -- I was personally involved in some of
5 those activities. I have some knowledge of -- in
6 that area. I have not prepared for that as part of
7 this deposition.

8 Q. All right. So you're not prepared as Brown &
9 Williamson's spokesperson to answer questions on that
10 subject here today; are you?

11 A. I don't believe so.

12 Q. Now you did have the opportunity to obtain some
13 documents that were American Tobacco documents in
14 your role as risk manager; correct?

15 A. Yes, I did.

16 Q. And as a matter of fact, you dealt directly with
17 American Brands to get those documents; didn't you,
18 sir?

19 MR. SCHNEIDER: Objection to the form.

20 A. I did have communications with American Brands.
21 I did also review files at American Tobacco.

22 Q. All right. I'd like to focus on the American
23 Brands communications you had. As a matter of fact,
24 American Brands passed on to you copies of insurance
25 company -- insurance policies for American Tobacco;

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1 correct?

2 MR. SCHNEIDER: Objection to the form,
3 outside the scope. He's giving his personal
4 knowledge on these topics.

5 MS. WIVELL: Yes.

6 MR. STARNES: And I object as outside the
7 scope of the deposition.

8 A. That is correct.

9 Q. And you passed those policies on to whom, sir?

10 A. I retained copies of those documents within the
11 risk management department. I may have -- I may have
12 given copies of those to our attorneys, in-house
13 counsel. I don't know of any other copies that
14 were -- were passed on.

15 Q. Well sir, didn't you send them off to London,
16 too?

17 MR. SCHNEIDER: Objection to the form,
18 again outside the scope.

19 A. I don't recall transmitting them to London.

20 MS. WIVELL: Just one moment, please.

21 Why don't we go off the record for a moment.

22 THE REPORTER: Off the record, please.

23 (Recess taken.)

24 BY MS. WIVELL:

25 Q. Sir, who is Daniel Barton?

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1 A. The name rings a bell. If you could show me
2 correspondence, then I may be able to recall.

3 Q. Well let me ask you this: What is Gibbs Hartley
4 Cooper North American Limited at Bishops Court in
5 London?

6 A. I believe they are underwriters.

7 Q. Ah, okay. You have dealt with underwriters in
8 London concerning American Tobacco insurance;
9 correct?

10 MR. STARNES: Objection, outside the scope.

11 MR. SCHNEIDER: Objection. Join in the
12 objection.

13 A. I have not personally done so, no.

14 Q. Didn't you send Mr. Daniel Barton of Gibbs
15 Hartley Cooper North American Limited copies of 11
16 product-liability claims filed or served against The
17 American Tobacco Company?

18 MR. STARNES: Objection, outside the scope.

19 MR. SCHNEIDER: Join in the objection.

20 A. If I can clarify, I believe you're referring to
21 the process in connection with this policy where we
22 are required to report periodically on the current
23 status of litigation cases to the underwriters, and
24 that is done from time to time, that's correct.

25 Q. And you received the information about those

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1 claims from American Brands and then passed them on
2 to the underwriters; correct?

3 MR. STARNES: Objection, outside the scope.

4 MR. SCHNEIDER: Objection to the form. And
5 join in the objection.

6 A. No, that's not correct. The original
7 information was provided by American Brands.
8 Following the acquisition we have continued to report
9 from time to time to the underwriters in accordance
10 with the policy requirements. The risk management
11 department obtains the information from outside
12 counsel.

13 Q. Well sir, didn't you obtain risk management
14 information concerning product-liability insurance
15 for American Tobacco from the American Brands risk
16 manager Daniel Pekera, P-e-k-e-r-a?

17 MR. STARNES: Objection, outside the scope.

18 MR. SCHNEIDER: Join in the objection.

19 A. In the initial stages, yes, we were in
20 communication with American Brands, and indeed they
21 gave us copies of the policy, as I testified earlier,
22 and they put us on notice of the requirement to
23 provide periodic reports to the underwriters, which
24 we have done so.

25 Q. Sir, let me ask you this about the American

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1 Tobacco documents. At the time of sale of American
2 Tobacco and its merger with Brown & Williamson, were
3 all American Tobacco documents provided to Brown &
4 Williamson?

5 MR. STARNES: Objection, outside the scope.

6 A. Could you repeat the question, please.

7 Q. Certainly.

8 At the time of sale of American Tobacco and its
9 merger with Brown & Williamson, were all American
10 Tobacco documents provided to Brown & Williamson?

11 MR. SCHNEIDER: Same objection.

12 A. I haven't prepared myself to answer to that. I
13 believe that the sale and the merger took place over
14 several months.

15 I know that steps were taken to sweep American
16 Tobacco's offices for responsive documents. I
17 believe that was done and that reviews were done by
18 Brown & Williamson employees of American Tobacco
19 records. Decisions were made as to what was
20 necessary to keep or not. But it is my understanding
21 that files were made available to Brown & Williamson,
22 yes.

23 Q. What did Brown & Williamson do to assure itself
24 that it had access to all of American Tobacco's
25 documents?

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1 A. Well it's my understanding following the
2 takeover that Brown & Williamson took early steps to
3 communicate its responsibilities to American
4 employees. We placed our management and staff in --
5 in those facilities and followed the usual course of
6 events that happens after an acquisition. And I'm
7 not prepared to speak in detail about what steps were
8 taken to secure documents in general.

9 Q. Did any Brown & Williamson employees or lawyers
10 or anyone acting on its behalf alert American Brands
11 that they wanted documents that belonged to or were
12 under the control of American Tobacco?

13 MR. STARNS: Objection, outside the scope.

14 A. I'm not aware of that. I don't know.

15 Q. Okay. So basically if I ask you any more
16 questions about the production of -- or I'm sorry,
17 whether or not American Tobacco documents were
18 destroyed, you feel that you would be able to answer
19 those questions factually and accurately?

20 A. Will you repeat the question, please.

21 Q. Sure.

22 If I ask you any more questions about whether or
23 not American Tobacco documents were destroyed, do you
24 feel you would be able to answer them accurately and
25 factually?

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1 MR. STARNES: Objection. To the extent the
2 question covers American documents that were not
3 transferred to Brown & Williamson as a result of the
4 merger, it's outside the scope of this deposition and
5 was the subject of a previous deposition.

6 MR. SCHNEIDER: I join in the objection.

7 A. I don't know. I don't know what your question's
8 going to be.

9 Q. Well have you tried to educate yourself about
10 what was done with American documents that came into
11 Brown & Williamson's possession?

12 A. I have not. I have given you testimony to that
13 at the prior deposition. I don't believe I have
14 any -- any more information to provide.

15 Q. All right. The reason I'm asking is I did
16 receive a letter from counsel that said you had
17 learned some more information, and I'm just trying to
18 find out what it was that you had learned.

19 MR. SCHNEIDER: If I -- if I may interject,
20 the letter originally dated May 6, really should have
21 been dated -- originally dated May 2, really should
22 have been dated May 6, has in it a question about
23 American Tobacco documents which is one of the
24 follow-ups you wanted to do, and in that response we
25 indicate that Brown & Williamson received certain

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1 documents from American Tobacco after the merger,
2 that certain of those documents were integrated into
3 B&W's file, that that integration process took place
4 prior to the sweep of Brown & Williamson in 1995 in
5 connection with this case. That any American
6 documents that were found during the course of our
7 sweep were also gathered up and reviewed by King &
8 Spalding in connection with its review. In addition,
9 as you learned from the deposition of Mr. Savell,
10 certain other documents were reviewed by the law firm
11 of Chadbourne & Parke. Finally, the answer also
12 indicates that certain documents in storage of
13 American Tobacco that were placed in Brown &
14 Williamson's storage were reviewed as well. That's
15 in the letter of May 6th.

16 MS. WIVELL: All right. And just for the
17 record, I was actually handed that officially about
18 an hour and a half ago; right?

19 MR. SCHNEIDER: You were handled -- handed
20 the official copy about an hour and a half ago. As I
21 understand it, a copy was faxed to you on May the
22 6th.

23 MS. WIVELL: At my office.

24 MR. SCHNEIDER: At your office.

25 MS. WIVELL: Fine.

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1 BY MS. WIVELL:

2 Q. Sir, do you have any additional information to
3 add about American Tobacco documents?

4 A. I don't believe I do.

5 MS. WIVELL: Then I have no further
6 questions.

7 MR. SVOBODA: You mean now, or where --
8 where --

9 You have no further questions, the deposition is
10 over?

11 MS. WIVELL: Unless he has something to
12 say.

13 MR. SVOBODA: Well thank you. You told me
14 that I should not check out.

15 MR. SCHNEIDER: We need to caucus a moment
16 to determine whether or not we want to ask any
17 further questions.

18 MS. WIVELL: Can we go off the record.

19 THE REPORTER: Off the record, please.

20 (Recess taken.)

21 MS. WIVELL: All right. Before we
22 officially end this deposition, because it was
23 noticed as an A deposition, I would like to change
24 that to a B designation.

25 MR. SCHNEIDER: That is acceptable.

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1 We have no questions at this time.

2 MS. WIVELL: Thank you.

3 THE REPORTER: Off the record, please.

4 (Deposition concluded at 3:46 o'clock p.m.)

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1 C E R T I F I C A T E

2 I, Richard G. Stirewalt, hereby certify
3 that I am qualified as a verbatim shorthand reporter;
4 that I took in stenographic shorthand the testimony
5 of RICHARD M. LOWTHER at the time and place
6 aforesaid; and that the foregoing transcript
7 consisting of pages 249 through 424 is a true and
8 correct, full and complete transcription of said
9 shorthand notes, to the best of my ability.

10 Dated at Washington, D.C., this 8th day of
11 May, 1997.

12

13

14

15 RICHARD G. STIREWALT

16 Registered Professional Reporter

17 Notary Public

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1 C E R T I F I C A T E

2 I, RICHARD M. LOWTHER, the deponent, hereby
3 certify that I have read the foregoing transcript
4 consisting of pages 249 through 424, and that said
5 transcript is a true and correct, full and complete
6 transcription of my deposition except:

7

8

9

10

11

12

13

14

15 RICHARD M. LOWTHER

16 Deponent

17

18 Sworn and subscribed to before me this day
19 of , 1997.

20

21

22

23 Notary Public

24

25 My commission expires .

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